

# Guidelines on the imposition and removal of demerit points by the Authority under Part 9A of the *Liquor Act 2007*



Under the *Liquor Act 2007* ('the Act'), the Independent Liquor & Gaming Authority ('the Authority') plays an important role in the Incentives and Demerit Point system ('the system') that applies to licensees, managers of licensed premises and club licences.

These Guidelines are intended to give additional information to the NSW Police Force and Liquor & Gaming NSW ('L&GNSW') about making prescribed complaints and the sort of evidence that can be presented to substantiate a prescribed complaint.

These Guidelines are also intended to support licensees, managers of licensed premises or the manager or secretary of a registered club in understanding:

- ▲ the type of information to include in submissions to the Authority about the proposed imposition of demerit points and remedial action
- ▲ the two avenues to apply to the Authority to remove demerit points and the requirements of each.

## Overview

The system replaces the Violent Venues, Three Strikes and Minors Sanctions schemes.

Demerit points are imposed or incurred for serious liquor law breaches, incidents or misconduct. The points attach to the licensee, manager of licensed premises or in the case of registered clubs, to the club's licence. Demerit points also attract additional annual liquor licence fee loadings so licensees or clubs will have to pay more as part of their licence fees at venues where demerit points have been incurred or imposed.

Demerit points can be issued in two different ways:

The first way is where a demerit offence occurs (defined in section 4(1) of the Act). Demerit offences reflect serious breaches of the liquor law.

The second way demerit points can be received is where a prescribed complaint is made to the Authority and it imposes them. Prescribed complaints are made in cases where there is a pattern of serious incidents or serious ongoing compliance concerns.

Under the Act, the Authority can:

1. consider a prescribed complaint from the NSW Police Force or L&GNSW and decide whether to impose 1 or 2 demerit points
2. consider whether to take remedial action where multiple demerit points are accumulated
3. consider an application to remove demerit points.

## 1. Prescribed Complaints made to the Authority by the Secretary or the Commissioner of Police

### What is a prescribed complaint?

Prescribed complaints allow the Authority to consider patterns of problematic behaviour in deciding whether to impose demerit points. For example, multiple violent offences, multiple intoxication offences and ongoing poor management at venues.

The Secretary or the Commissioner of Police can make a prescribed complaint to the Authority for the following reasons:

- ▲ the licensee or manager has engaged in conduct or activities that are likely to encourage **misuse or abuse of liquor** (such as binge drinking or excessive consumption) (s139(3)(f))
- ▲ **intoxicated persons** have frequently been on the licensed premises or have frequently been seen to leave those premises (s139(3)(g))
- ▲ acts involving **violence against persons or damage to property** have frequently been committed on or near the licensed premises by persons who have been on the licensed premises (s139(3)(h))

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- ▲ **two or more serious indictable offences** involving violence have been committed within a 12-month period
  - i. by persons on the licensed premises, or
  - ii. near the licensed premises by persons who have been on the licensed premises within a reasonable time before the act occurred, or
  - iii. near the licensed premises by persons attempting to enter, or who have been refused entry to, the licensed premises within a reasonable time before the act occurred (s139(3)(ha)).
- ▲ **two or more incidents posing a serious risk to the health or safety of persons** have occurred within a 12-month period
  - i. involving persons on the licensed premises, or
  - ii. near the licensed premises involving persons who have been on the licensed premises within a reasonable time before the incident occurred, or
  - iii. near the licensed premises involving persons attempting to enter, or who have been refused entry to, the licensed premises within a reasonable time before the incident occurred (s139(3)(hb)).
- ▲ the size and patron capacity of the licensed premises and any impact those factors have on the ability of the licensee or manager to prevent or manage the acts or circumstances forming the grounds for the prescribed complaint
- ▲ any demerit points incurred under Subdivision 1 for a demerit offence arising from the conduct or activity, circumstances, act, or incident on which the prescribed complaint is based
- ▲ any disciplinary action taken under Part 9 by the Authority in relation to the prescribed complaint.

These factors are not exhaustive. The Authority can consider any other matters that are relevant to the prescribed complaint and deciding whether to impose demerit points.

The types of evidence that can be provided by the Secretary or the Commissioner of Police to support the prescribed complaint includes:

- ▲ the facts relied on,
- ▲ the compliance history of the licensee or manager,
- ▲ records of violent incidents occurring in connection with the premises,
- ▲ Bureau of Crime Statistics and Research ('BOCSAR') data on alcohol-related violence,
- ▲ Police COPS records,
- ▲ Penalty Notices,
- ▲ records from Revenue NSW on penalty notice data,
- ▲ evidence of court convictions, and
- ▲ the relevant Liquor Licence details.

L&GNSW analyse BOCSAR data on alcohol-related violence regularly and this analysis can be used to inform decisions about whether a prescribed complaint should be made to the Authority.

Strikes imposed under the previous Three Strikes scheme are no longer in force. However, any conditions on the licence or remedial action taken due to them, remain in force. The offence that led to the strike also remains on the licensee or managers record. L&GNSW can actively monitor venues with an adverse compliance history or that have received a strike in the past.

The prescribed complaint must be about: 'conduct, activities engaged in, circumstances existing, acts committed or incidents that occurred' on or after the commencement of Part 9A Demerit points scheme of the Act.

It is not intended that licensees, managers and clubs be penalised twice with demerit points through the prescribed complaints process where a demerit point has already been incurred.

### What evidence should the Secretary or the Commissioner of Police include to support a prescribed complaint to the Authority?

The evidence that should be given to the Authority when a prescribed complaint is made should be relevant to the factors listed below.

The Authority will consider these factors in deciding whether to impose demerit points:

- ▲ the nature and seriousness of the grounds for the prescribed complaint
- ▲ the nature and seriousness of any outcome of the acts or circumstances forming the grounds for the prescribed complaint

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Before making a prescribed complaint to the Authority, the Secretary or Commissioner of Police should consider the size and patron capacity of the licensed premises and its impact on the ability of the licensee or manager to prevent or manage the acts or circumstances that form the grounds for the prescribed complaint. If the number of acts or circumstances forming the grounds for the complaint are a very small proportion of the size and patron capacity of the venue, the Secretary or Commissioner of Police may decide not to make a prescribed complaint to the Authority.

After considering a prescribed complaint, the Authority can decide to impose demerit points or take no action. The Authority can impose demerit points in addition to the disciplinary actions available to it under Part 9 of the Act.

### What evidence a licensee, manager of licensed premises, or manager or secretary of a registered club should include in a submission to the Authority on why demerit points should not be imposed?

After considering any submissions, the Authority will decide whether to impose demerit points for a prescribed complaint.

The submission process is an opportunity for the licensee, the manager of licensed premises or the manager or secretary of a registered club to provide evidence to the Authority that is relevant to the factors it will consider in making its decision to impose demerit points (listed above). This can include such things as:

- ▲ incident registers kept at the premises,
- ▲ CCTV footage,
- ▲ details of any measures that are in place to manage risks of violence or risks to safety, and
- ▲ details of any changes to business practices that have occurred during and after the period the prescribed complaint relates to.

The Authority can consider measures that are being used by venues to reduce safety risks or violence, where they are included in a submission. It can consider the appropriateness and efficacy of such measures in managing or reducing risks.

The Authority will give written notice to the licensee, manager of the licensed premises or for registered clubs, the manager and secretary of the club, to tell them it proposes to impose demerit points.

Anyone who has received the notice of proposed demerit points from the Authority can make a written submission to it on why the demerit points should not be imposed. The submission period runs for 21 days after the day the Authority gives the notice of proposed demerit points.

Once the Authority has decided on whether to impose demerit points or not, it will give written notice of its decision (s144O(1)).

## 2. Consideration of remedial action by the Authority where there are multiple demerit points

### What remedial action is available to the Authority?

The Authority can take remedial action where two or more demerit points are accumulated over a 3-year period by a licensee, manager of licensed premises or on a club licence.

The range of remedial actions available to the Authority increases as the number of demerit points accumulated over the 3-year period rises. The fact sheet FS3015 'Incentives and Demerit Point System' sets these out, which you can find in the ILGA section of [liquorandgaming.nsw.gov.au](http://liquorandgaming.nsw.gov.au). Where four or more demerit points have been accumulated, the Authority can suspend the licence for up to 7 days.

### When can the Authority consider remedial action?

The Authority can consider remedial action where two or more demerit points are accumulated over a 3-year period.

The Authority can consider:

- ▲ the venue's history of demerit offences and prescribed complaints
- ▲ the effectiveness of any remedial actions that have already been taken
- ▲ what else can be done to address the risks that have led to the demerit points being issued.

If a venue experiences alcohol-related violence, the Authority can impose conditions on the licence that are designed to manage this, such as: venue safety plans, drink restrictions, requirements to implement security measures and lockout of patrons (as previously included in the Violent Venues scheme).

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### What will the Authority consider in taking remedial action for the accumulation of demerit points?

In deciding what remedial action to take, the Authority can consider the following factors (s144ZA(1)(a)(ii) of the Act):

- ▲ the size and patron capacity of the licensed premises and any impact those factors have on the ability of the licensee or manager of the licensed premises to prevent a demerit offence being committed or another prescribed complaint
- ▲ the history and nature of the commission of demerit offences by the licensee or manager
- ▲ the history and nature of prescribed complaints that have been made
- ▲ whether other action would be preferable

- ▲ whether there have been changes to the persons who are the licensee, manager of the licensed premises, or owner of the business carried on under the licence
- ▲ whether there have been changes to the business practices in respect of the business carried on under the licence.

These factors are not exhaustive. The Authority can consider any other matter it considers is relevant in making the decision to take remedial action (s144ZA(1)(b)).

In deciding whether to take remedial action, the Authority must consider submissions that are made by people who have been given notice of the proposed remedial action, the NSW Police Force, local consent authorities for the licensed premises and the Secretary (s144ZA(1)(a)).

The Authority will give written notice of any remedial action it proposes, as set out below:

Where the Authority proposes remedial action:	The Authority must give written notice to the following people:
Against a licensee or manager	<ul style="list-style-type: none"> <li>▲ the licensee or manager of the licenced premises against whom the remedial action is proposed</li> <li>▲ the licensee for the licensed premises where remedial action is proposed against a manager of licensed premises</li> <li>▲ the owner of licensed premises</li> <li>▲ each person interested in the business or in the conduct or profits of the business (whose names have been given to the Authority under s41 or 55 of the Act)</li> </ul>
That relates to the licence (other than a club licence)	<ul style="list-style-type: none"> <li>▲ the licensee</li> <li>▲ the manager of the licensed premises</li> <li>▲ the owner of the licensed premises</li> <li>▲ each person interested in the business or in the conduct or profits of the business (whose names have been given to the Authority under s41 or 55 of the Act)</li> </ul>
Against a club licence	<ul style="list-style-type: none"> <li>▲ the Secretary</li> <li>▲ the manager of club premises</li> <li>▲ the relevant member of the club's governing body if the Authority is proposing to reprimand or disqualify a member</li> </ul>

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Anyone who receives written notice from the Authority of its intention to impose remedial action can make a submission to it. The submission period runs for 21 days after the day the Authority gives notice.

## What evidence to include in submissions to the Authority on proposed remedial action?

A licensee, manager of licensed premises, or the secretary or manager of a registered club can include matters in their submission to the Authority that show what mitigating measures or changes to business practices have been voluntarily adopted since receiving the demerit points. Examples of these are: installing CCTV, introducing membership and entry standards which bar or suspend members involved in antisocial behaviour and terminating licensee or managers who were responsible when the demerit points were received. These demonstrate changes to who the licensee or manager of the premises are and business practices, since receiving the demerit points.

The NSW Police Force, local consent authorities for the licensed premises and the Secretary can include information in their submission on why the Authority should take remedial action and can offer suggestions on the kind of remedial action they consider is appropriate.

## 3. Removal of demerit points

### When can a demerit point be removed by the Authority?

Demerit points expire after 3 years however the Authority can also remove demerit points earlier. This provides an incentive for licensees and managers to improve their behaviour and comply with liquor laws.

The Authority can consider two different types of applications to remove demerit points:

- ▲ Application to remove a category 1 demerit point – clear 10-year record
- ▲ Application to remove demerit points – demonstrated improvement after at least 12 months.

The Authority will consider different factors, depending on which type of application is being considered.

Application must be in the form and manner approved by the Authority and be accompanied by the fee and comply with any other requirements approved by the Authority (s144ZC(3)).

### What are the requirements for an application to remove a category 1 demerit point – clear 10-year record?

The application for removing category 1 demerit point is intended to provide a pathway for venues that have maintained a good past record.

A licensee, manager of licensed premises or secretary of a registered club can apply to have a category 1 demerit point removed if:

- ▲ there is only one category 1 demerit point in place and
- ▲ in the previous 10-years before the application, the licensee, manager of licensed premises or manager of club premises has not committed any other demerit offence and no other demerit points have been received.

If a demerit offence (see FS3015 'Incentives and Demerit Point System' fact sheet for complete list) was committed in the past ten years, including before the introduction of the Incentives and Sanctions system, an application to remove a category 1 demerit point cannot be made.

The Authority must give a reasonable opportunity for a person to make submissions to support the application to remove demerit points.

The Authority must give a copy of any application it receives for the removal of demerit points for a clear 10-year record to:

- ▲ the NSW Police Force
- ▲ local consent authorities for the licensed premises
- ▲ the Secretary.

The Authority must also consider any submissions it receives from the Police Force, local consent authority or the Secretary.

The Authority can decide to remove a category 1 demerit point if it is satisfied that:

- ▲ the Secretary and the Authority have not taken any action related to the licensee, manager of the licensed premises or the licence for the licensed premises, related to the demerit point or the act or circumstances that were the basis of the demerit offence which attracted the demerit point and
- ▲ the act or circumstances that were the basis of the demerit offence that attracted the demerit point did not cause serious harm to any person and

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- ▶ the licensee or manager has implemented measures or completed training or instruction to manage or reduce risks that contributed to the demerit offence (this does not include training or instruction that is required under the Act or regulations) and
- ▶ no demerit offences have been committed by the licensee, manager of the licensed premises or by the manager of club premises since the demerit point was received.

### ‘Serious harm’

‘Serious harm’, for example, may include harm that:

- ▶ endangers a person’s life
- ▶ consists of, or results in, serious or protracted impairment of physical or mental function
- ▶ consists of or results in serious disfigurement.

### ‘Measures or completed training or instruction’

Examples of what can be considered as ‘measures, training or instruction to reduce the risks that contributed to the demerit offence’, will depend on what demerit offence was committed. It may include such things as: training staff to improve practices at the venue, adopting increased security measures at the venue or adopting patron management strategies.

The ‘measures, training or instruction’ that is used to show how the risk is being managed or reduced, must go beyond what is mandatory training for licensees and managers under the Liquor law.

### What are the requirements for an application to remove demerit points – demonstrated improvement after at least 12 months?

A licensee, manager of licensed premises or secretary of the registered club can apply to the Authority to have a demerit point removed if at least 12 months have passed since the demerit point was received and they have taken steps to improve.

The Authority can decide to remove a demerit point if it is satisfied that:

- ▶ any remedial action taken by the Authority that is related to the demerit point has been complied with and
- ▶ the licensee or manager of licensed premises has implemented measures or completed training or instruction to manage or reduce risks that

contributed to the demerit offence or the prescribed complaint that attracted the demerit point (this does not include training or instruction that is required under the Act or regulations) and

- ▶ no demerit offences have been committed by the licensee, manager of the licensed premises or by the manager of club premises since the demerit point was received.

The Authority must give a reasonable opportunity for a person to make submissions to support the application to remove demerit points.

The Authority must give a copy of any application it receives for the removal of demerit points for demonstrated improvement after at least 12 months to:

- ▶ the NSW Police Force
- ▶ local consent authorities for the licensed premises
- ▶ the Secretary.

The Authority must also consider any submissions it receives from the Police Force, local consent authority or the Secretary.

The Authority must also consider if the licensee has complied with any local liquor accord, where the licensee has entered one.

If the Authority decides to remove a demerit point, any remedial action taken as a result of the demerit point continues, until the Authority decides otherwise.

The Authority must give written notice of its decision, the reasons for its decision, and how the decision can be reviewed by the NSW Civil and Administrative Tribunal.

### Reinstatement of demerit points

The Authority can reinstate a demerit point where a demerit point was removed, if it is satisfied that the demerit point was removed on the basis of false, misleading, inaccurate or incomplete information provided by the licensee, manager of licensed premises or secretary of a registered club (s144ZF(1) and (2)).

Any remedial action taken or condition imposed on the licence when the demerit point was issued continues to apply as if the demerit point had not been removed (s144ZF(4)(a) and (b)).

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## Attachment to Guideline 17 Guidelines on the imposition and removal of demerit points by the Authority under Part 9A of the *Liquor Act 2007*

### The meaning of specific terms and phrases used in setting out the reasons a prescribed complaint can be made

This section gives guidance on the meaning that should be given to certain words and phrases that are used in the sections of the Act that set out the reasons a prescribed complaint can be made.

#### **‘Frequently’**

The word ‘frequently’ is already used in the Act in s139(3)(g) and s139(3)(h). A specific number does not define what is meant by ‘frequently’. It will vary on a case by case basis as it will depend on:

- ▲ the seriousness of the incidents
- ▲ the number of incidents
- ▲ the period over which they are committed.

#### **‘Serious indictable offence’**

In s139(3)(ha) ‘serious indictable offence’ has the same meaning as in s4 of the *Crimes Act 1900*: an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.

#### **‘Near’**

In section 139(3)(ha)(ii) and (hb)(ii), the word ‘near’ means 50 metres. This definition is consistent with what has been used by the NSW Police Force under the previous Violent Venues scheme.

#### **‘Serious risk to health or safety’**

In s139(3)(ha) and s139(3)(hb), the phrase ‘serious risk to health and safety’ is intended to capture circumstances where patron health or safety has been put at serious risk. To establish this, the way that the business of the licensed premises has operated and how it is supervised or managed are likely to be relevant as they demonstrate how the ‘risk to health or safety’ has been managed.

The kinds of factors that can be considered in deciding what is a ‘serious risk to health or safety’ include:

- ▲ the likelihood of the risk occurring
- ▲ the degree of harm that might result from the risk
- ▲ what the licensee or manager knows, or ought reasonably to know about the risk and ways of eliminating or minimising the risk
- ▲ the availability and suitability of ways to eliminate or minimise the risk.

#### **‘Reasonable time’**

‘Reasonable time’ means a fair and sensible length of time looking at the facts of the incident. It will vary on a case by case basis.