

Disciplinary complaints under section 139 of the *Liquor Act 2007*



Overview

This Guideline provides information about the procedures for making a disciplinary complaint to the Authority in relation to a licensee, close associate or manager, and about the Authority's procedures for determining such complaints.

Background

1. Part 9 of the *Liquor Act 2007* ("Act") confers on the Authority the power to take disciplinary action against certain regulated participants in the NSW liquor industry. The Authority has the discretion to impose a variety of administrative sanctions if it is satisfied that one or more grounds specified by the Act have been established.
2. The Authority considers that its disciplinary powers under Part 9 are directed towards bringing to order some identified "fault" or "laxity" (which may not necessarily rise to the level of negligence or criminality) on the part of a respondent that it is in the public interest to remedy. Part 9 is directed towards disciplining, not simply good management, although taking disciplinary action should also promote the good management of a licensed premises. The penalties available under Part 9 are potentially serious and prospective complainants should carefully consider whether the facts and circumstances are such that they warrant commencing disciplinary action rather than using sections 53 and 54 of the Act, that are directed more specifically towards the improved management of licensed premises.
3. The Authority's powers under Part 9 may be contrasted with the powers of the Authority and the Secretary of the Department of Customer Service ("Secretary") to impose, vary or revoke licence conditions under sections 53 and 54 of the Act. The powers under sections 53 and 54 may be exercised even where there is no demonstrated fault on the part of a respondent

licensee, so long as there is a reasonable basis for taking the regulatory action. These provisions are directed towards the good management of licensed premises rather than towards disciplining a licensee or other designated person.

Making a complaint under section 139 of the Act

4. Section 139(1) of the Act provides that a disciplinary complaint ("Complaint") may be made to the Authority in relation to a licensee, a manager (that is, an "approved manager" appointed by a corporate licensee) or a close associate of a licensee ("the Respondent"). Section 138 provides that a reference in Part 9 to a "licensee" or "manager" includes a former licensee or manager.
5. Complaints may only be made by the Secretary, the Commissioner of Police or a "person authorised" by the Liquor Regulation 2018 ("Regulation"). At present, clause 73 of the Regulation only authorises the relevant local consent authority (Council) for the licensed premises concerned to make a Complaint.
6. A Complaint must be in writing and specify the grounds on which it is made. There are 22 general grounds that may be relied upon by a Complainant under section 139(3) of the Act.
7. 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 lga.secretariat@liquorandgaming.nsw.gov.au.
8. The Form should be signed and dated by the Complainant and accompanied by a separate, more detailed submission letter ("Submission"), setting out:
 - a. information identifying the licensed premises and current, confirmed details of the address and other contact details (including email address) of the Respondent, to enable the Authority to effect prompt service of the Complaint upon the Respondent;

- b. the ground(s) relied upon;
 - c. the facts alleged by the Complainant that, if found, will establish each ground of Complaint;
 - d. the supporting evidence or other material 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, this should be clearly stated);
 - e. submissions in support of the request for disciplinary action, including what, if any, action the Complainant believes the Authority should take under section 141 or 144L of the Act, in relation to each ground of complaint that might be established and why;
 - 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 with regard to the Respondent, and if so, to what end;
 - g. whether, if a Complaint is made against a licensee, the Authority should also consider action against a “person interested” in the licensed business under section 141(6) of the Act and if so, why;
 - h. whether the Complainant considers that any information submitted by the Complainant should not be disclosed to the Respondent or other parties, should be disclosed only in part or should only be disclosed on a confidential basis and, if so, why. Reasons for non-disclosure or partial disclosure may include, for example, protecting 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;
 - i. whether any information submitted by the Complainant is “criminal intelligence” within the meaning of subsection 140(6) of the Act and of a nature that the Authority should not disclose and, if so, why;
 - j. if any material is not to be disclosed to the Respondent the Complainant shall furnish a separate, “non-confidential” version of the submission that provides the Complaint with sufficient detail to enable the licensee or other interested person to respond to the facts alleged by the Complainant;
 - k. an index of all material submitted in support of the Complaint; and
 - l. the name, office held, place of work and contact details of the Complainant and confirmation (if the Complainant is an officer exercising delegated power) that the Complainant is an officer authorised pursuant to section 157 of the Act.
9. 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.
10. 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.
11. If the Secretary seeks an order for payment of its costs on an investigation, the Complainant should provide a concise breakdown of those costs.
12. 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.
13. 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.

14. When the Complaint is made in electronic form and the material cannot be sent by email or other electronic means due to the size of the documents, 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 Club and each individual party against whom action may be taken should the Complaint be established. Any audio-visual material must be provided in a format that is viewable with commonly used media player software.
19. While material submitted to the Authority need not be presented in “admissible” form, parties may nonetheless receive some guidance from the rules of evidence when preparing a Complaint.

Standard of Proof

Informal Process

15. The Authority is an independent administrative body, not a court. The Authority administers its disciplinary powers in a manner that is efficient and informal, with a view to minimising time and costs to all stakeholders. The Authority is not bound by rules of evidence when considering a Complaint but it is required to comply with the rules of natural justice or procedural fairness. 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.
16. A conference will only be convened in the absolute discretion of the Authority, where in the opinion of the Authority it would assist the Authority’s decision.
17. If a conference is convened, it will not be in the mode of an adversarial hearing whereby the parties are able to cross examine each other’s witnesses. Parties may be legally represented, but this is not necessary. Parties can expect that the Authority has read all written submissions prior to any conference. As a general rule, parties have less than one hour to deliver an oral submission and will be guided by the Convener of the conference as to the key issues for discussion. Parties should be prepared to answer questions from the Authority.
18. It is a matter for the Respondent whether he or she wishes to participate in the conference convened by the Authority. Should a Respondent decline, or fail to respond to, the offer of an oral hearing, the matter will be determined “on the papers”.
20. Fact finding in disciplinary proceedings is made 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.
21. This will require that the evidence or other material before the Authority enables it to reach a comfortable 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.
22. When a Complainant asserts that a Respondent 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. 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.
23. When a Complainant asserts that a penalty notice was issued against a Respondent with regard to an alleged offence against the Act, 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 penalty notice.

24. Section 150(7) of the Act provides that, if a penalty notice is paid in respect of an alleged offence against the Act, then the person who was served with the penalty notice is taken to have been convicted of the offence for the purposes of a Complaint.

Making a submission about a Complaint

25. Section 140(2) of the Act requires the Authority to write to a Respondent inviting the Respondent to show cause why disciplinary action should not be taken against him or her (“Show Cause Notice”).
26. Under section 140(3) of the Act, the Authority must also invite written submissions concerning the Complaint from the following parties:
- if the licensee occupies the licensed premises under a lease – the lessor,
 - each person named in the written statement referred to in section 41 that accompanied the application for the licence,
 - each person named in the information provided to the Authority (as required by section 55) who has become interested in the business, or the conduct of the business, carried out on the licensed premises concerned, and
 - if the grounds for taking the proposed disciplinary action relate to a person (other than the licensee) not being a fit and proper person – that person.
27. Under section 144M(1) of the Act, the Authority must invite written submissions concerning the Complaint from the following parties:
- if the Authority proposes to impose a demerit point against a licensee – the licensee,
 - if the Authority proposes to impose a demerit point against a manager – the manager and licensee,
 - if the Authority proposes to impose a demerit point against a club licence – the manager and club secretary.
28. When a Complaint is received, the Authority will send a Show Cause Notice to the Respondent enclosing a copy of all material received by the Authority, subject to any redactions made pursuant to paragraph 8(h) or (i) of this Guideline.
29. In responding to a Show Cause Notice, the Respondent and any other parties invited to make a written submission should:
- address all grounds of the Complaint, including the particulars for each ground; and
 - 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.
30. 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.
31. 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.
32. The Show Cause Notice will specify a reasonable period of time (usually 28 days) within which written submissions may be made in response to the Complaint. If submissions are received within time, the Authority will consider those submissions prior to making any decision. If no submissions are received within time, the Authority may promptly determine the matter on the material before it. Respondents should ensure that they address the merits of the Complaint by the time specified. If Respondents wish to raise preliminary legal issues as part of their response to a Complaint they may do so promptly, but must be prepared to address the merits of a Complaint by the time specified in the Show Cause Notice.
33. A response to a Show Cause Notice or statements from other parties should take the form of a sworn statement (such as a Statutory Declaration).

34. If a matter is complex, the Authority may give the Complainant an opportunity to make further written submissions in reply to matters raised in the Respondent's submissions, followed by a second round of written submissions from the Respondent.
35. Complainants should not assume that there will be two rounds of written submissions or that the Authority will convene a conference. A conference will only be convened in the absolute discretion of the Authority, where in the opinion of the Authority, it would assist the Authority's decision making. To the full extent practicable, Complainants should present their entire case upon filing the Complaint, and the Respondent and any other parties making a submission 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.
36. The Authority expects written submissions to be comprehensively articulated in clear and explicit terms. In the event the Authority is minded to convene a conference, this will also ensure that the Authority may use conference time productively and no party is "taken by surprise" by matters raised at the conference.
37. Whenever written submissions are made by a party, they should be provided to the Authority in electronic form, wherever practicable, by email to ilga.secretariat@liquorandgaming.nsw.gov.au.
- c. order the licensee or manager 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 the case of an individual), 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 the case of an individual),
- d. suspend or cancel any authorisation or other approval (other than the licence itself) held by the licensee under the Act,
- e. impose a condition to which the licence, or any authorisation or approval held by the licensee under the Act, is to be subject or revoke or vary a condition to which the licence or any such authorisation or approval is subject,
- f. disqualify the licensee from holding a licence or from being the manager of licensed premises or the close associate of a licensee, for such period as the Authority thinks fit,
- g. withdraw the manager's approval to manage licensed premises,
- h. disqualify the manager from being the manager of licensed premises, or from holding a licence or being the close associate of a licensee, for such period as the Authority thinks fit,
- i. in the case of a limited licence held on behalf a non-proprietary association – order that a limited licence is not, for a period of not more than 3 years from the date on which the decision takes effect, to be granted to any person on behalf of the non-proprietary association,
- j. disqualify the close associate from being a close associate of a licensee or the manager of licensed premises for such period as the Authority thinks fit,
- k. disqualify the close associate from holding a licence for such period as the Authority thinks fit,

Disciplinary Powers of the Authority

38. The Authority has discretion under section 141(2) as to whether it should take action against a Respondent if satisfied that a ground of Complaint has been established. If it does decide to take action, the Authority may:
- a. cancel the licence,
 - b. suspend the licence for such period not exceeding 12 months (or, if circumstances of aggravation exist in relation to the Complaint, not exceeding 24 months) as the Authority thinks fit,

- l. order the licensee, manager or close associate to pay the amount of any costs incurred by:
 - i. the Secretary in carrying out any investigation or inquiry under section 138 in relation to the licensee, manager or close associate, or
 - ii. the Authority in connection with the taking of disciplinary action against the licensee, manager or close associate under section 141, or
- m. reprimand the licensee, manager or close associate.
- n. after dealing with and determining a prescribed complaint under Part 9, the Authority may, in addition to taking any disciplinary action under that Part, decide to impose 1 or 2 demerit points against a licensee, approved manager or club licence.

Action against other interested persons

39. In deciding whether to take disciplinary action against a licensee in relation to a Complaint, the Authority may also take disciplinary action against a person who is interested in the business, or in the conduct or profits of the licensed business (Act, section 141(5)). Section 141(6) provides that the Authority may, in its discretion:
 - a. disqualify the person, for a period commencing on a specified day, from being a person interested in the business, or in the conduct or profits of the business, carried on under a licence, and/or
 - b. reprimand the person.
40. Before taking action against such a person, the Authority must give notice to the person and give him or her the opportunity to make submissions to the Authority.
41. The Authority notes that section 141(6) of the Act empowers the Authority to disqualify a person from holding an interest in any business carried on under a liquor licence in New South Wales, not just the licensed business that was the subject of the Complaint.

Determination

42. If the Authority decides to take disciplinary action against a Respondent or another interested party under part 9 of the Act, the Authority is required by section 142 and 144O of the Act to notify the relevant party and provide reasons for its decision.
43. 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.

Appeal rights

44. Under section 144 of the Act, a decision made by the Authority under part 9 of the Act in relation to a Complaint may be subject to review by the NSW Civil and Administrative Tribunal ("NCAT"). An application for review of the Authority's decision must be made by the Complainant or the person against whom any disciplinary action is taken by the Authority in relation to the Complaint. An application for review may be filed with 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

45. 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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