

# Applications for Review under Section 36A of the *Gaming and Liquor Administration Act 2007*



This Guideline provides information to prospective applicants for review and other stakeholders about the Authority's arrangements for conducting reviews on the merits of certain decisions made by the Secretary, Department of Industry under the *Liquor Act 2007*, *Gaming Machines Act 2001*, *Gaming and Liquor Administration Act 2007* and the *Registered Clubs Act 1976*.

## Background

1. The Authority has the power, under section 36A(1) (a) of the *Gaming and Liquor Administration Act 2007* ("Act") to review, on the merits, certain decisions made under the *Liquor Act 2007* by the Secretary, Department of Industry (the Secretary). These decisions are:
  - i. a decision under section 54 to impose a condition on a licence or to vary or revoke any such condition,
  - ii. a decision under section 54A to give a direction relating to the operation of a "sale on other premises" authorisation,
  - iii. a decision under section 75 to give a direction relating to licensed premises,
  - iv. a decision under section 81 in relation to a disturbance complaint,
  - v. a decision under section 87 to make a late hour entry declaration,
  - vi. a decision under section 90 to vary or revoke a late hour entry declaration,
  - vii. a decision under section 101 to restrict or prohibit the sale or supply of undesirable liquor products,
  - viii. a decision under section 102A to restrict or prohibit activities that encourage misuse or abuse of liquor,
  - ix. a decision under section 102 to restrict or prohibit the undesirable promotion of liquor.

- x. a decision under section 136 to give a direction to contribute to the costs of promoting or giving effect to a local liquor accord, and
  - xi. a decision under section 136E to impose a condition on a licence requiring a licensee to participate in a precinct or community event liquor accord
  - xii. a decision under section 136F to give a direction to contribute to the costs associated with the operation of a precinct liquor accord
2. The Authority may also review, pursuant to section 36A(1)(b) and (c) of the Act respectively, a decision of the Secretary to make a direction under section 44A of the *Gaming Machines Act 2001* (regarding the location of gaming machines in venues) and to make a direction under the Registered Clubs Accountability Code within the meaning of *Registered Clubs Act 1976* (on requirements relating to management contracts). Under section 36A(1) (d) the Authority may review a decision made by an Authority delegate if it is prescribed as a reviewable decision by the Gaming and Liquor Administration Regulation 2016 (see clauses 6 and 7).
  3. All of the decisions described in paragraphs 1 and 2 are referred to in this Guideline as "Reviewable Decisions".

## Making an Application

4. An application for review ("Review Application") must be in writing and may only be made by the applicant for, or the holder of, a liquor or gaming licence or a person who was required to be notified of an application and had made a submission on this. The Authority may confirm, vary or revoke the decision under review (Act, section 36A(4)).
5. When making a Review Application, the Review Applicant should identify his or her relationship to the relevant venue and explain how his or her interests are affected by the Reviewable Decision.

6. The form for making a Review Application, APP998 'Request to review a delegated Independent Liquor & Gaming Authority Board decision made by Liquor & Gaming NSW' ("the Form"), is available for download from the Liquor & Gaming website at [liquorandgaming.nsw.gov.au](http://liquorandgaming.nsw.gov.au). The Form, fee and any supporting material should be lodged with Liquor & Gaming NSW, with each individual document (such as a submission letter, statement of evidence, and any annexures) submitted as separate attachments.
7. Review Applications should be emailed to [ilga.secretariat@liquorandgaming.nsw.gov.au](mailto:ilga.secretariat@liquorandgaming.nsw.gov.au) with 'APP998 Review delegated L&GNSW decision' in the subject line.
8. When a statement of evidence is provided, it should take the form of a sworn statement, such as a statutory declaration.
9. Clause 5(1) of the Gaming and Liquor Administration Regulation 2016 ("Regulation") provides that an Application must:
  - a. be made within 28 days of the day on which the Reviewable Decision was made;
  - b. specify the grounds on which the Review Application is made;
  - c. be accompanied by a copy of the decision of the Secretary (if the decision was provided in writing to the person making the application); and
10. To be accompanied by a fee of \$500 in the case of a licence applicant, or \$100 if another eligible party
11. The Authority considers that it does not have a discretion under the legislation to entertain Review Applications regarding decisions made by the Secretary that are filed with the Authority more than 28 days after the day on which the Reviewable Decision was made. To avoid doubt, this refers to the date that the letter formally notifying the Reviewable Decision was signed off by the Secretary or delegate. This is not to be confused with any "effective date" for the commencement of any measures imposed by the decision maker that might be specified in the Reviewable Decision.

### Grounds for Review should be Sufficiently Specified

12. Clause 5(1)(b) of the Regulation requires Review Applicants to "specify" the grounds on which the Review Application is made in the application. The Authority considers that this requires Review Applicants to provide an explanation of the Review Applicant's case that is sufficiently specific to enable the Authority (or an interested party) to understand, in a practical sense, which aspects of the Reviewable Decision the Review Applicant is aggrieved by and why – without the need for further elucidation.
13. Bare assertions that "the decision is wrong"; "the decision is unreasonable"; "the decision is against the weight of evidence"; or "the decision is not the correct and preferable decision" do not, of themselves, specify why the decision should be confirmed, varied or revoked by the Authority.

### Notification of the Secretary

14. A Review Applicant must provide the Secretary with a copy of the Review Application as soon as practicable after making the Review Application to the Authority (Regulation, clause 5(2)). This can be done by delivering a copy of the Review Application to the attention of the Director of Compliance, Liquor & Gaming NSW.
15. Within 7 days of receiving notice of a Review Application, the Secretary is required to send the Authority a copy of all material that was considered by the decision maker when making the Reviewable Decision. To the extent practicable, this material should be sent by email, with separate documents submitted as separate attachments in PDF format and unsecured.

### Payment of Fees

16. Payment of the prescribed fee should be made when the Review Application is lodged. Payment may be made in accordance with the payment options specified on the Form. If the fee is not paid, the Review Application will not be processed and may be refused. The Authority does not have any discretion to waive the Review Application fee.

### Processing an Application

17. After initial processing, the Authority will write to the Review Applicant, acknowledging receipt of the Review Application and advise a date when the matter is likely to be first considered by the Authority.
  18. As the Secretary will have only recently determined the matter under review, the Secretary may provide the Authority with a statement further explaining the Reviewable Decision.
  19. If the Secretary elects to make a statement, this may accompany the material that is provided to the Authority under paragraph 14 of this Guideline. Should any submission from the Secretary be received by the Authority, a copy will be provided to the Review Applicant, who will be given a reasonable opportunity to reply.
  20. If a Reviewable Decision has been made in response to an application or submission made by a third party (for example, the NSW Police Force, a local council or a local resident) then that third party will be given an opportunity to respond to the Review Application before the Authority finally determines the matter. Any third party submission will be provided to the Review Applicant for a reply.
  21. Absent exceptional circumstances (for example, if certain information provided by Police is operationally sensitive), when consulting with the Review Applicant and third parties, the Authority will provide a copy of the entire bundle of material that is furnished by the Secretary to the Authority under paragraph 14 of this Guideline.
- brought to the direct attention of the Authority via email to [ilga.secretariat@liquorandgaming.nsw.gov.au](mailto:ilga.secretariat@liquorandgaming.nsw.gov.au).
24. The Authority has discretion as to whether or not it will issue a stay of the reviewable decision. There are several principles that the Authority will apply when considering a stay application:
    - a. It is sufficient that the Review Applicant seeking a stay demonstrate a reason or an appropriate case to warrant favourable exercise of the discretion: *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694.
    - b. The onus is upon the Review Applicant seeking a stay to demonstrate a proper basis for a stay which will be fair to all parties.
    - c. The mere filing of a Review Application does not demonstrate an appropriate case or discharge of the onus.
    - d. The Authority has a discretion involving the weighing of considerations such as the balance of convenience and the competing rights of the parties.
    - e. Where there is a risk that the Review Application may prove abortive should the Review Applicant ultimately succeed but be required to comply with the reviewable decision in the interim, the Authority should normally exercise its discretion in favour of granting a stay.
    - f. The Authority will not generally speculate upon the Review Applicant's prospects of success, but may make some preliminary assessment about whether the Review Applicant has an arguable case, in order to exclude an appeal lodged without any real prospect of success simply to gain time.
  25. The Authority will, in the usual case, determine a Stay Application based upon the Reviewable Decision and the material provided by the Stay Applicant. By reason that these applications are considered on an expedited basis, the Authority will not usually consult with third parties at this preliminary stage, unless this is necessary to afford procedural fairness to those parties. Other procedural matters relevant to stay applications are noted at paragraph 30 of this Guideline.

### Application for Stay of Decision under Review

22. Section 36A(3) of the Act provides that a Review Application does not operate to stay a Reviewable Decision unless the Authority otherwise directs. This means that the Reviewable Decision will continue to have effect, notwithstanding that a Review Application has been lodged, unless the Authority makes a direction to the contrary.
23. Review Applicants who seek a stay of a Reviewable Decision should make that application ("Stay Application") at the time of lodging the Review Application and provide written submissions in support of it. To expedite processing, a copy of the Stay Application must be

26. The Authority may decide to stay the Reviewable Decision in whole or part, or to refuse the stay application. In general, the Authority will endeavour to notify the Applicant of its decision within 7 days of receiving the Stay Application, and will also communicate its decision to the Secretary, the NSW Police Force and any other interested third party. The Authority does not usually provide statements of reasons when determining a Stay Application.

### Informal Procedure

27. The Authority is an independent administrative body, not a court. Section 36B of the Act 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 gaming and liquor legislation.

28. The Authority administers its power to review Reviewable Decisions in a manner that is as efficient and informal as possible, with a view to minimising time and costs to all stakeholders.

29. While the Authority may, in its discretion, decide to conduct an interview, convene a conference, or receive further submissions either orally or in writing, the Authority will usually determine a Review Application “on the papers” (that is, on the basis of the written material before it).

30. The Authority is not bound by the rules of evidence when considering a Review Application or a Stay Application. While material submitted to the Authority need not be presented in a form which would be admissible in a court of law, applicants may nonetheless receive guidance from the rules of evidence when preparing an Application.

For example:

- material submitted in support of an Application should be relevant to satisfying the Authority as to the grounds for review that are stated in the Application;
- 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.

### New Evidence and Submissions

31. The Authority may consider new evidence or other material that was not before the Secretary at the time the Reviewable Decision was made. To the extent practicable, any new evidence or submissions in support of a Review Application must be submitted to the Authority upon making the Review Application and be relevant to the grounds of review specified in the Review Application.

32. New evidence or submissions may be of assistance when informing the Authority as to the impact of the Reviewable Decision, or to deal with events that have transpired since the Reviewable Decision was made.

33. If new evidence or other material is provided by any party, that party should provide an explanation as to why it was not possible to place that evidence or material before the Secretary during the primary decision-making phase and why that evidence is relevant to the grounds of review set out in the Review Application. As noted in paragraph 17 of this Guideline, the Secretary may make a statement to the Authority about the Reviewable Decision, and the statement may note whether any material now before the Authority was not before the Secretary during the primary decision-making process.

34. The Authority will provide a copy of any new evidence or other material to any other party to the Review.

### Determination

35. The Authority’s role when conducting a review is to reconsider the matter with the benefit of all of the material before it and in the circumstances prevailing at the time of making its determination.

36. Special provision is made in relation to the Authority's review of a decision that a licensee must pay a contribution towards the costs associated with the operation of a precinct liquor accord. Section 36A(5) of the Act provides that when reviewing a decision of the Secretary under section 136F of the Liquor Act 2007 (concerning payments associated with participation in a precinct liquor accord), the Authority may only vary or revoke the Reviewable Decision if the Authority is satisfied that the amount of contribution directed to be paid was not determined in accordance with the terms of the relevant precinct liquor accord.

### Notification of Authority's Decision

37. When the Authority has made its decision, it will issue a letter to the Review Applicant briefly advising its decision and a copy of that letter will be sent to the Secretary. In order to expedite notification of the decision, the Authority may, in its discretion, advise the outcome of a review informally before the formal decision letter is issued.

38. The Authority's decision letter, which may be accompanied by a copy of the Secretary's decision that was subject to review, will be published on the Liquor & Gaming NSW website at [liquorandgaming.nsw.gov.au](http://liquorandgaming.nsw.gov.au)

### Appeal Rights

39. There is no statutory mechanism for review on the merits of a review decision made by the Authority under section 36A. 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*.

### Guideline updated June 2018