

Applications for the Imposition, Revocation or Variation of Licence Conditions under Section 53 of the *Liquor Act 2007*



Overview

This Guideline provides information to stakeholders, and guidance to the Director General of the Department of Trade and Investment, Regional Infrastructure and Services and the NSW Commissioner of Police, as to the Authority's preferred processes for the making and determination of an application to impose, revoke or vary licence conditions under section 53 (1) or (2) of the *Liquor Act 2007*.

Background

1. Section 53 of the *Liquor Act 2007* (“**Act**”) concerns the power of the Authority to impose new conditions upon a licence and to vary or revoke those licence conditions that were previously imposed (or taken to have been imposed) by the Authority.
2. Section 53(1) of the Act provides that the Authority may impose conditions on a licence if the Director General of the Department of Trade and Investment, Regional Infrastructure and Services (“**Director General**”) or the Commissioner of Police (“**Commissioner**”) applies for such conditions to be imposed, or on its own initiative. Under section 53(1A) of the Act, these may include, without limitation, conditions:
 - a) prohibiting the sale or supply of liquor on the licensed premises before 10 am or after 11 pm, or both; and
 - b) restricting the trading hours of, and public access to, the licensed premises.
3. Section 53 (2) of the Act provides that the Authority may vary or revoke licence conditions that have been imposed (or taken to have been imposed) by the Authority if the Director General or the Commissioner or the licensee applies for such conditions to be varied or revoked, or on the Authority's own initiative.

The Director General's power to impose conditions under section 54 of the Act

4. As an alternative to making an application under section 53 of the Act (“**Application**”), it is open to the Commissioner or a delegate of the Commissioner to request the Director General to consider imposing conditions on a licence under section 54(1) of the Act. Under that provision, the Director General may impose conditions on a licence for such reasons, or in such circumstances, as the Director General considers necessary or appropriate.

5. The effect of section 54(5) of the Act is that the Director General may not impose a condition that is inconsistent with a condition that was imposed by the Authority, the Act or the *Liquor Regulation 2008* (“**Regulation**”), and the Director General is not entitled to vary or revoke such a condition.
6. The Authority considers it preferable, from a policy perspective, for delegates of the Commissioner to first approach the Director General, for two reasons:
 - Should Police Applicants maintain a practice of applying to the Authority for the imposition of new conditions at first instance, this may defeat an apparent intention of Parliament that licensees receive a primary decision from the Director General and a right of merits review by the Authority under section 36A of the *Gaming and Liquor Administration Act 2007*; and
 - Once a licence condition is imposed by the Authority, the Director General is unable to exercise the power under section 54(2) to vary or revoke that condition, depriving the regulatory framework of the expertise and enforcement capacity of the Director General in that regard.

Making an Application to the Authority

7. Form AM0130 is the appropriate form in cases where the Applicant is the Director General or the Commissioner. Form AM0140 is the appropriate form when the Applicant is the licensee of the relevant premises. These forms are available for download from www.olgr.nsw.gov.au/liquor_forms.asp. Applications should be addressed to the Chief Executive of the Authority and it is strongly preferred that Applications be lodged by email to: liquorapplications@olgr.nsw.gov.au.
8. The relevant form should be signed and dated by the Applicant and submitted as a PDF file when lodged electronically. It should be accompanied by a separate, more detailed submission (“**Submission**”) in the form of a WORD file, that sets out:
 - a) responses to all questions posed on Part 2 of the form (if not provided on the face of the form);
 - b) information identifying the licensed premises and current, confirmed details of the address and contact details (including email address)

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- of the licensee to enable prompt service of the Application upon the licensee;
- c) the alleged facts and circumstances and any submissions in support of the Applicant's request for the imposition, variation or revocation of licence conditions;
 - d) any relevant antecedents - for example, whether issues similar to those raised 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;
 - e) whether it is the Applicant's view that any information submitted by the Applicant should not be disclosed to third parties, should be disclosed only in part or should only be disclosed on a confidential basis and, if so, why. Examples of reasons why non-disclosure or limited disclosure may be desirable include to protect the identity of an undercover police officer or to protect the identity of a third party complainant in cases where the Applicant has reasonable grounds for believing that disclosure may cause harm to that complainant;
 - f) if any material is not to be disclosed to third parties (such as the licensee or manager of the premises) a separate, "non confidential" version of the Submission should be enclosed that provides sufficient detail to enable the licensee or other interested person to respond to the facts alleged by the Applicant;
 - g) an index of all material submitted in support of the Application; and
 - h) 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*".
9. The Submission may annex evidence or other 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 when the Application is lodged.
10. When larger files cannot readily be emailed (for example, audio-visual material stored on DVD, CD or portable hard drive) two (2) copies should be delivered to the Authority in physical form. Audio-visual material must be submitted in a format that is viewable with commonly used media player software.
- Note:** *When preparing an Application, Applicants under section 53(1)(a) of the Act should consider the Authority's duty to afford natural justice, as discussed in paragraph 14 of this Guideline. While there is scope for submitting material to the Authority on a confidential basis, an Applicant should consider whether any material that is too sensitive to be disclosed to a respondent should be relied upon.*

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 impose, vary or revoke licence conditions 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 expects to determine Applications "on the papers" (that is, on the basis of the written material before it).
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 an Application. For example:
 - material submitted in support of an Application should be relevant to satisfying the Authority that a proposed new condition or variation or revocation of an existing condition is necessary;
 - in some circumstances the Authority may give greater weight to direct witness evidence than (say) second-hand hearsay evidence;

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- 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.

Natural Justice

14. The Authority must observe the requirements of administrative law, including principles of natural justice or procedural fairness, when undertaking administrative action. Section 53(4) of the Act provides that the Authority may not impose upon a new condition upon an existing licence, or vary or revoke a condition of a licence, unless it has given the licensee a reasonable opportunity to make submissions about the proposed action and taken such submissions into consideration.

15. Applicants are advised that the key facts and contentions asserted in an Application should be supported by appropriate evidence or other material. While media reports, police intelligence, crime statistics and alcohol linking data may provide a useful overview of the impact of a premises upon a locality, it is preferable that the key facts and contentions be supported by material that is sufficiently specific to enable a licensee to respond – for example, relevant records from the “COPS” database, witness statements, or CCTV footage relating to specific events.

16. When an Application under section 53(1)(a) is received, the Authority will send a letter to the licensee notifying receipt of the Application and enclosing a complete copy of all material that was received from the Applicant, subject to any redactions made pursuant to paragraph 8(e) and (f) of this Guideline. The letter will advise the licensee of a period of time (usually 21 days) within which written submissions may be made in response to the Application. If written submissions are received within the time specified, the Authority will consider those submissions prior to making its decision. If no submissions are received within time, the Authority may promptly make a decision on the material before it.

17. If submissions are received, the Authority will write to the Applicant providing a further, brief opportunity (usually 7 days) to make any written submissions in reply. This is an opportunity for the Applicant to deal with any facts or contentions arising from the submissions of the licensee, not to make new claims or submissions on matters that were not identified in the Application at first instance. A copy of any reply will be provided to the Applicant after it is received by the Authority and in advance of the Authority’s determination.

18. When written submissions are made by the Applicant, the licensee or any other interested party, they should be provided in electronic form, wherever practicable, by email to the Authority.

Authority may impose conditions “not inconsistent” with the Act

19. Section 53(1) of the Act precludes the Authority from imposing a new condition which permits something which is prohibited by the Act, or which results in a situation where it would be impossible to obey both the new condition and the Act.

20. However, subject to consistency with the statutory objects under section 3 of the Act, the Authority may impose new conditions on a licence in addition to those that are imposed by the Act itself. This means that it is open to the Authority to impose more onerous conditions on a licence than would otherwise apply.

21. For example, a proposed condition that required there to be a lock out at premises from 1 am would not be “inconsistent” (in the relevant sense) with a special licence condition imposed by the Act that there be a lock out from 2 am, since it is possible to comply with both conditions.

Determination

22. When the Authority has made its decision, it will issue a letter to the licensee briefly advising the terms of its decision.

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Appeal Rights

23. There is no statutory mechanism for review on the merits of a decision made by the Authority under section 53 of the Act. 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

24. 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

On **8 November 2012**



Chris Sidoti

Chairperson



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