

Applications for Banning Orders under Section 78 of the *Liquor Act 2007*



Independent
Liquor & Gaming
Authority

Overview

This guideline provides information to the Director General of the Department of Trade and Investment, Regional Infrastructure and Services, the NSW Commissioner of Police and other stakeholders as to the Authority's approach to exercising its power to issue orders banning persons from entering licensed premises. It also provides guidance as to the procedures for applying for such an order.

Background

1. Section 78 of the *Liquor Act 2007* (“**Act**”) concerns the power of the Authority to issue an order (“**Banning Order**”) prohibiting a person from entering or remaining on specified licensed premises for a period not exceeding 6 months.
2. The Authority may make a Banning Order if the person who is the subject of the order (“**the Respondent**”) has repeatedly been intoxicated, violent, quarrelsome or disorderly on or in the immediate vicinity of licensed premises (Act, section 78(4)). The Authority is not permitted to take into consideration the person's race or ethnic or national origins when deciding whether to make a Banning Order (Act, s 78(7)).
3. The Director General of the Department of Trade and Investment, Regional Infrastructure and Services (“**Director General**”), the Commissioner of Police (“**Commissioner**”), a licensee who is a party to a local liquor accord or any person prescribed by the regulations may apply for a Banning Order (Act, section 78(2)). No persons are currently prescribed by the regulations.
4. A “local liquor accord” is a code of practice, memorandum of understanding or other arrangement that affects the supply of liquor, the opening and closing of licensed premises or other aspects of the management or conduct of business on licensed premises. It is entered into for the purpose of eliminating or reducing alcohol-related violence or anti-social behaviour or other alcohol-related harm (Act, section 131).
5. The legal requirements for the constitution and commencement of a local liquor accord are set out in sections 131-136 of the Act. Licensees may obtain further information about them from www.olgr.nsw.gov.au/accords_home.asp.

Alternatives to Banning Orders

6. Briefly, the alternatives to making an application for a banning order include “barring” a person (a common law right that is recognised under section 78(13) of the Act), the exercise of temporary exclusion powers under section 78(2) of the Act, self exclusion of a person under section 76 of the Act or informal negotiation if that option is appropriate.
7. At common law, the occupiers of licensed premises may exercise private property rights that arise independently of any statutory right to exclude a person, by withdrawing that person's implied licence to enter or remain upon the premises (see, for example, *Heatley v Tasmanian Racing and Gaming Commission* (1977) 133 CLR 487) although the High Court has indicated that a duty to accord natural justice may arise before excluding a member of a club – *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, per Gibbs J and Murphy J at 507-511. In *Giddings v Director of Public Prosecutions* (2008) NSWSC 169, James J affirmed that such a common law right could be relied upon to require a person to leave licensed premises notwithstanding the statutory right under the (now repealed) *Liquor Act 1982* to exclude persons. See also the decision of the New South Wales Court of Appeal in *Hinkley v Star City Pty Ltd & Anor* (2011) NSWCA 299 regarding the operation of common law property rights alongside a statutory power (in that case power to exclude persons from a licensed casino under the *Casino Control Act 1992*).
8. For further industry guidance, see the Refusal of Entry and Patron Bans/Barring Guidelines published on the “liquor” section of the Office of Liquor Gaming and Racing website www.olgr.nsw.gov.au

Making an Application to the Authority

9. Form AM0333 (for applications by the Director General or Commissioner) and Form AM0343 (for Applications by licensees) (“**the Form**”) is available for download from www.olgr.nsw.gov.au/liquor_forms.asp. It is strongly preferred that Applications be lodged by email to: liquorapplications@olgr.nsw.gov.au.

IMPORTANT NOTICE

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10. The Form should be signed and dated by the Applicant and submitted as a PDF file when lodged electronically. The detail of the Application should be provided in a separate, more detailed submission (“**Submission**”) that accompanies the Form and is submitted as a WORD file, that sets out:
- a) responses to all questions stated on Part 2 of the Form (if not provided on the face of the Form);
 - b) identification of the licensed premises from which the Respondent is to be banned and up to date, confirmed address and contact details (including email address if available) of the Respondent to enable prompt communication with the Respondent;
 - c) the alleged facts and circumstances and any submissions made in support of the Application, directed to the requirements of section 78(4) of the Act. The Applicant should identify the period (not exceeding six months) of the Banning Order that is sought, an explanation why that period is reasonable in the circumstances and why the alternatives listed in paragraph 6 of this Guideline are not considered appropriate in the circumstances
 - d) any relevant antecedents – for example, whether issues similar to those raised in the Application have been the subject of recent formal or informal action with regard to the Respondent, and if so, to what end;
 - e) whether any information submitted by the Applicant to the Authority should not be disclosed, should be disclosed only in part or should only be disclosed on a confidential basis and, if so, the reasons why (for example, 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 or harassment to that complainant);
 - f) if the Applicant proposes that any material is not to be disclosed to relevant third parties (such as the Respondent a separate, “non-confidential” copy of the Submission should be enclosed that sets out the Application in sufficient detail for the Respondent to understand and respond to the facts alleged by the Applicant;
 - g) an index of all material submitted in support of the Application;
 - 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*”;
 - i) a sworn statement (in the form of an affidavit or statutory declaration) by the Applicant or their agent (for example, a professional process server) verifying that a copy of all material comprising the Application (or the “non-confidential” version, as the case may be) has been served personally upon the Respondent, with details of the time, date and mode of service;
 - j) a photograph of the Respondent that is capable of assisting the staff or security contractors at licensed premises to identify the Respondent, should a Banning Order be made;
11. 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, such as incident registers. Any annexure should be provided separately and not in the form of a consolidated document, so that each document may be readily extracted from the rest of the material. All supporting material should, wherever practicable, be submitted in electronic form, or otherwise delivered to the Authority when the Application is made.
12. When larger files cannot readily be emailed (for example, audio-visual material stored on DVD, CD or portable hard drive) they may be delivered to the Authority in physical form to the attention of the Chief Executive, provided that copies are served upon the Respondent. Audio-visual material must be submitted in a format that is viewable with commonly used media player software.
- Note:** *When preparing an Application, Applicants should consider the Authority’s duty to afford natural justice, as discussed at paragraphs 19-24 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.*

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Minimum Requirements for a Banning Order

13. Where the Authority finds it appropriate, it will obligate the Applicant to serve the Application to the licensee/s of licensed premises from which the Respondent is banned.
14. An Applicant may seek the banning of a person from one or more licensed premises. Section 78(4) provides that the Authority may only make a Banning Order if satisfied that the Respondent:
 - has been “intoxicated, violent, quarrelsome or disorderly”, and
 - has engaged in this misconduct “repeatedly”, and
 - has engaged in this misconduct on “licensed premises”, or in the “immediate vicinity” of licensed premises.
15. Section 5 of the Act provides that a person is “intoxicated” if:
 - a) the person’s speech, balance, co-ordination or behaviour is noticeably affected, and
 - b) it is reasonable in the circumstances to believe that the affected speech, balance, co-ordination or behaviour is the result of the consumption of liquor.
16. “Violent”, “quarrelsome” and “disorderly” are not defined by the Act and have their ordinary meanings.
17. The misconduct identified by an Applicant must have been committed “repeatedly” by the Respondent before the Authority may make a Banning Order. “Repeatedly” is not defined by the Act and has its ordinary meaning. The purpose of section 78 is the protection of the public, which is to be achieved by addressing a demonstrated pattern of misconduct by an individual. One or two isolated incidents would not usually warrant the making of a Banning Order, but three reasonably contemporaneous incidents could, in the Authority’s view, indicate a pattern.
18. The relevant misconduct must have occurred either on, or in the immediate vicinity of, licensed premises. The concept of “immediate vicinity” is not defined by the Act, but the Authority considers this to include the environs of licensed premises, any car park and the footpath and street that runs immediately adjacent to the perimeter of a licensed premises.

Informal Process

19. 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.
20. The Authority administers its power to determine Applications 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 most Applications “on the papers” (that is, on the basis of the written material before it).
21. 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 Banning Order for the proposed period is necessary;
 - 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.

Natural Justice

22. The Authority must observe the requirements of administrative law, including principles of natural justice or procedural fairness, when undertaking administrative action.
23. Applicants are advised that the key facts and contentions asserted in an Application should be supported by appropriate evidence or other material.

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While media reports, police intelligence, crime statistics and alcohol linking data may provide a useful overview, it is preferable that the key facts and contentions be supported by material that is sufficiently specific to enable a Respondent to respond – for example, relevant records from the police “COPS” database, witness statements by police, OLGR or third parties or CCTV footage relating to specific events, when available.

24. When an Application is received, the Authority will send a letter to the Respondent 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) of this Guideline. This letter will specify a reasonable period of time (not less than 7 days) within which written submissions may be made in response to the Application. If 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.
25. Applicants should ensure that all material they wish to provide in support of the Banning Order is made with the initial Application. While the Authority has a discretion as to how it processes an Application, Applicants should not assume that they will have the opportunity to supplement their case later in the decision-making process, as further submissions from the Applicant may necessitate a right of reply, thus delaying the process. A copy of any submissions from the Respondent will be provided to the Applicant for the Applicant's information in advance of the Authority's determination.
26. When written submissions are made by any party they should, wherever practicable, be provided in electronic form by email to the officer identified in the Authority's letter notifying receipt of the Application.

Banning Order for a period “not exceeding” six months

27. The Authority will consider all submissions received in response to an Application and exercise its own judgment as to whether a Banning Order should be granted and, if so, whether it should be granted for the period sought by the Applicant.

28. Section 78(6) of the Act provides that a Banning Order made by the Authority must specify a period (not exceeding six months) during which a Banning Order is in force. The Authority notes that six months is the *maximum* banning period that the Authority may impose under section 78 of the Act.
29. Applicants should not assume that a ban for six months will be automatically imposed if a Banning Order is made, but should ensure that the Submission explains why the period sought is a reasonable regulatory response in the circumstances. The maximum banning period may only be appropriate in relatively serious cases. It is open to a Respondent or other interested parties to make submissions explaining why no Banning Order should be granted, or why a different period to that sought by the Applicant should be imposed.

Penalty for breach of a Banning Order

30. Contravention of a Banning Order is an offence against section 78(8) of the Act, which provides that a person who is the subject of a Banning Order must not enter or attempt to enter, or remain on, the licensed premises to which the order relates. The maximum penalty for contravention is 50 penalty units.

Determination

31. The Authority will send its decision letter to the Applicant, usually by a recorded mode of delivery and by email if available, briefly advising whether or not a Banning Order has been granted. Copies of the order will be sent to the relevant licensee(s) and any other interest parties (including Police and OLGR inspectors) for their records. While it is not the Authority's practice to issue full statements of reasons in these matters, a brief summary of the Authority's decision may be provided. A copy of any photograph of the Respondent that has been made available to the Authority may also accompany the letter if a Banning Order has been issued.
32. If the Authority issues a Banning Order, it will send notice of that order to the Respondent's address. As criminal sanctions flow from non-compliance with a Banning Order, Police Applicants are recommended to also personally serve a copy of the Order upon the Respondent to remove any doubt that the Respondent has received notice of the Order.

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33. If an Application is complete and parties comply with the Authority's timeframes for submissions, a decision will usually be made promptly after the process outlined in this Guideline has been observed. The Authority may expedite the processing of an Application if it is in the public interest to do so, for example, where a relevant licensed premises is located within a designated precinct to which a Precinct Liquor Accord applies (under s136B of the Act).

34. The Authority will, in the usual case, publish its decisions on its website www.ilga.nsw.gov.au but with the identity of the Respondent redacted. This is because Banning Orders may be of a temporary and localised nature and there may be an insufficient public interest in notifying persons other than the Respondent, local law enforcement agencies and the relevant licensed premises of the identity of the Respondent. Nevertheless, the Authority reserves its right to publish, in an appropriate case, a decision identifying the Respondent along with a copy of the Respondent's photograph, if satisfied that it is in the public interest to do so.

Appeal Rights

35. There is no statutory mechanism for review on the merits of a decision made by the Authority under section 78 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

36. 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 **6 August 2014**



Chris Sidoti

Chairperson



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