

## Disciplinary Complaints under Section 139 of the *Liquor Act 2007*



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Liquor & Gaming  
Authority

### 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 upon the Authority the power to take disciplinary action against certain regulated participants in the New South Wales 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 Justice, (“**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.
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 2008* (“**Regulation**”). At present, clause 73 of the Regulation only authorises the relevant local consent authority (local 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 (Act, section 139(2)). There are 20 general grounds that may be relied upon by a Complainant under section 139(3) of the Act. They are:
  - a) that the licensee or manager has, while holding a licence or managing licensed premises, been convicted of an offence under the Act or the regulations (or under the *Liquor Act 1982*) or of an offence prescribed by the regulations,
  - b) that the licensee or manager has failed to comply with any of the conditions to which the licence is subject,
  - c) that the licensee has failed to comply with any of the conditions to which any authorisation or approval held by the licensee under the Act is subject,
  - d) that the licensee or manager has failed to comply with any other requirement under this Act or the regulations (or under the *Liquor Act 1982*), relating to the licence or the licensed premises,
  - e) that the licensee or manager has failed to comply with a direction or other requirement of the Authority, the Secretary or the Commissioner of Police under the Act (or of the Secretary or the Commissioner under the *Liquor Act 1982*),
  - f) that 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),
  - g) that intoxicated persons have frequently been on the licensed premises or have frequently been seen to leave those premises,

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- h) that 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,
- i) that the licensee is not a fit and proper person to be the holder of a licence (whether for the same reason as that set out in section 45(5) of the Act or otherwise) or the manager is not a fit and proper person to be the manager of the licensed premises (whether for the same reason as that set out in section 68(4A) of the Act or otherwise),
- j) that the close associate is not a fit and proper person to be a close associate of a licensee,
- k) that a complaint against a licensee under this section has been made and that:
  - i) the close associate knew or ought reasonably to have known that the licensee was engaging (or was likely to engage) in conduct of the kind to which the complaint relates, and
  - ii) the close associate failed to take all reasonable steps to prevent the licensee from engaging in conduct of that kind,
- l) that the close associate is (or has become) a close associate of a licensee while disqualified by the Authority from being a close associate,
- m) that a person who is interested in the business, or in the conduct or profits of the business, carried on under the licence is not a fit and proper person to be so interested,
- n) that a person is (or has become) a person who is interested in the business, or in the conduct or profits of the business, carried on under a licence while disqualified by the Authority under Part 9 of the Act from being a person so interested,
- o) in the case of a limited licence—that the licensee has not exercised proper control and supervision over a function held under the licence,
- p) in the case of a limited licence—it is not in the public interest for liquor to be sold or supplied at functions held by or under the auspices of the non-proprietary association on whose behalf the licence is held,
- q) in the case of a licence held by a corporation—that a person who occupies a position of authority in the corporation is not a fit and proper person to occupy such a position in a corporation that is the holder of a licence,
- r) that public entertainment has been conducted on the licensed premises otherwise than in accordance with any requirements under the *Environmental Planning and Assessment Act 1979* relating to the use of the premises for public entertainment,
- s) that the licence has not been exercised in the public interest, or
- t) that the continuation of the licence is not in the public interest.

## Making a Complaint to the Authority

7. Complaints should be made in accordance with the forms on the website of the Office of Liquor, Gaming & Racing. Form AM0222 (“**the Form**”) is available at [www.olgr.nsw.gov.au/liquor\\_forms.asp](http://www.olgr.nsw.gov.au/liquor_forms.asp). Complaints should be addressed to the Chief Executive of the Authority and it is strongly preferred that Complaints be made by email to: [info@ilga.nsw.gov.au](mailto:info@ilga.nsw.gov.au)
8. The Form should be signed and dated by the Complainant and submitted as a PDF file when lodged electronically. It should be accompanied by a separate, more detailed submission letter (“**Submission**”) in the form of a WORD file, 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 (unless this information is provided in the Form);
  - 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;
  - 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 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;

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- 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 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 Complaint, 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 material. All supporting material should, wherever practicable, be submitted in electronic form, or otherwise delivered to the Authority when the Complaint is lodged.
10. If a Complaint is filed in hard copy, the Complaint should be presented in lever arch folder(s) with numbered dividers for each individual document (with each annexure to a document treated as a separate document). The documents should be presented sequentially, with the Form as document 1, the cover letter to the Submission as document 2 and so on.
11. When supporting material cannot readily be emailed (for example, large files of audio-visual material stored on DVD, CD or portable hard drive) two (2) copies should be delivered to the Authority in hard copy. Audio-visual material must be submitted in a format that is viewable with commonly used media player software.
- Note:** *Complainants should consider the Authority’s duty to afford natural justice, as discussed in paragraph 20 of this Guideline. While there is scope for submitting material to the Authority on a confidential basis (and subsection 140(6) provides that the Authority need not disclose “criminal intelligence”), the Authority prefers to release all material that forms part of a Complaint to a Respondent, wherever appropriate. A Complainant should carefully consider whether any material that is too sensitive to be disclosed to a Respondent should be relied upon at all.*

## Informal Process

12. 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.
13. The Authority will only convene a Conference in exceptional circumstances and at the discretion of the Authority. 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.
14. 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

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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. The Conference will usually be transcribed.

in accordance with the kind of processes that are appropriate to a statutory authority, not a Court of law.

15. 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”.
16. 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. For example:
  - material submitted in support of a Complaint or another party’s submission should be relevant to the grounds identified in the Complaint;
  - 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 a Complaint.

## Standard of Proof

17. 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.
18. 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

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19. 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.
20. 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 the New South Wales State Debt Recovery Office as to the current payment status of the Penalty Notice.
21. 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.
  - d) 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.
24. When a Complaint is received, the Authority will send a Show Cause Notice to the Respondent enclosing a complete copy of all material received by the Authority, subject to any redactions made pursuant to paragraph 8(h) or (i) of this Guideline.
25. 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.
26. 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).
27. 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.
28. Complainants should not assume that there will be two rounds of written submissions not 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.
29. The Authority expects written submissions to be comprehensively articulated in clear and explicit terms, addressing the alleged facts and contentions relating to the Complaint. 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.

## Natural Justice

22. The Authority must observe the requirements of administrative law, including principles of natural justice or procedural fairness, when undertaking administrative action. 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**").
23. Under section 140(3) of the Act, the Authority must also invite written submissions concerning the Complaint from the following parties:
  - a) if the licensee occupies the licensed premises under a lease—the lessor,
  - b) each person named in the written statement referred to in section 41 that accompanied the application for the licence,
  - c) 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,

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30. Whenever written submissions are made by a party, they should be provided to the Authority in electronic form, wherever practicable, by email.

### Disciplinary Powers of the Authority

31. 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:

- cancel the licence,
- 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,
- order the licensee or manager to pay, within such time as is specified in the order:
  - 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
  - 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),
- suspend or cancel any authorisation or other approval (other than the licence itself) held by the licensee under the Act,
- 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,
- 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,
- withdraw the manager's approval to manage licensed premises,
- 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 of 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,

- 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,
- disqualify the close associate from holding a licence for such period as the Authority thinks fit,
- order the licensee, manager or close associate to pay the amount of any costs incurred by:
  - the Secretary in carrying out any investigation or inquiry under section 138 in relation to the licensee, manager or close associate, or
  - the Authority in connection with the taking of disciplinary action against the licensee, manager or close associate under section 141, or
- reprimand the licensee, manager or close associate.

### Action against other interested persons

32. 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:
- 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
  - reprimand the person.
33. 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.
34. 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.



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