



FIREARMS REGISTRY
DECISION MAKING GUIDELINES

AUGUST 2019

Title:	Decision Making Guidelines
Subject:	Decision Making Guidelines for Adjudicators Assessing Applications for Licences, Permits, and Authorities Pursuant to NSW Firearms and Prohibited Weapons Legislation.
Command responsible:	NSW Firearms Registry
Authorisation:	Commander - NSW Firearms Registry
Publication date:	12 August 2019
Current version number:	1.1
Review date:	12 August 2020
Document number:	1
Copyright statement:	Copyright of this document is vested in the Commissioner of Police. © 2019
Suitable for Public Disclosure:	YES

CONTENTS

OVERVIEW / PURPOSE	4
POLICY POSITION ON DECISION MAKING	4
OVERVIEW OF DECISIONS UNDER THE LEGISLATION	5
» What is a suspension?	5
» What is a refusal?	5
» What is a revocation?	5
» What is a condition?	5
» What is an internal review?	6
APPROPRIATE RECORDING OF DECISIONS	6
LEGISLATIVE DECISION TYPES	7
» Automatic	7
» Mandatory	8
» Discretionary	9
» Legislative Decision Types Table	13
GUIDE TO DISCRETIONARY DECISION MAKING	15
» Overview	15
» Balance of Probabilities	15
» State of satisfaction	15
» Relevant factors	16
» The public interest	16
» Fit and proper person	21
» Way of living or domestic circumstances	24
» Attempted suicide and/or cause a self-inflicted injury	26
» Intemperate Habits – Unsound Mind	26
» Storage and safety requirements are capable of being met	28
» Decision Making Flowchart	29
» Discretionary Decision-Making Table	31
PRESCRIBED OFFENCES	34
» Mandatory disqualification	34
» Conviction not recorded or matter withdrawn/dismissed	35
» Prescribed Offences - Refusal / Revocation Provisions	37
» Common Penalty Types Table	40
DECISION REFERRAL	41
» What is a decision referral and when should it be used?	41
» Decision referral document	41
» Inappropriate decision referrals	42
GLOSSARY OF TERMS	43

OVERVIEW / PURPOSE

One of the core and most important functions of the Firearms Registry is decision making. The Firearms Registry administers and makes decisions in accordance with the following legislation:

- Firearms Act 1996 (the Firearms Act)
- Firearms Regulation 2017 (the Firearms Regulation)
- Weapons Prohibition Act 1998 (the Weapons Act)
- Weapons Prohibition Regulation 2017 (the Weapons Regulation).

Decisions are made under the legislation by delegates of the Commissioner of Police.

Provisions within the legislation provide automatic, mandatory and discretionary decision making. Some decisions will be based on a combination of these provisions. The more difficult decisions are those where discretion must be applied and where decision makers are required to demonstrate their understanding of the applicable law and apply a degree of personal judgement.

This document provides decision makers with guidelines to assist them to make appropriate, sound, legislatively compliant and consistent decisions.

These guidelines provide advice on the principles which decision makers must consider when making decisions. It also provides the following resources:

- Legislative decisions types table
- Prescribed offences – refusal/revocation provisions table
- Common penalty types table
- Discretionary decision-making process flowchart
- Discretionary Decision-making table
- ‘Consideration Factors’ for each prescribed offence and common discretionary decision types (e.g. public interest)
- Discretionary decision-making examples (case studies)
- How and when to prepare a decision referral.

This document is a guide and is not intended to be a substitute for reviewing the legislation and up-to-date case law. These guidelines will be reviewed 12 months after implementation and as required following legislative change.

POLICY POSITION ON DECISION MAKING

The principles for decision making within the Firearms Registry are:

1. The Firearms Registry is committed to legal, accountable, streamlined and efficient decision making at all levels
2. Decision making is made at the appropriate level by authorised persons closest to the issue
3. Decision makers will be supported in the decision-making process by their supervisors and managers, however they remain accountable for the decisions that they make
4. All adjudicator/assessors are authorised to make decisions that their delegation authorises them to do so, in accordance with the relevant legislation.

OVERVIEW OF DECISIONS UNDER THE LEGISLATION

These guidelines deal with the following decisions under the Firearms Act and the Weapons Act:

- issuing or refusing to issue a licence or permit
- suspending a licence or permit
- revoking a licence or permit and
- imposing a condition on a licence or permit.

These guidelines do not deal with the decision to impose a firearms prohibition order. Nor do they deal with whether a person has a “genuine reason” to have a licence under **section 12** of the Firearms Act. In relation to the “good reason” to acquire a firearm under **section 31(3)(c)** of the Firearms Act, an adjudicator should consider the “genuine reason” the licence holder relied upon in their application for a firearms licence. The adjudicator should ensure the “good reason” accords with the applicant’s “genuine reason” for which they required a firearm licence. The adjudicator should follow the Decision Making Tool and, in complex matters, consult their supervisor.

WHAT IS A SUSPENSION?

A suspension is a temporary hold on a licence or permit. A person is not authorised to possess or use firearms/prohibited weapons during the specified suspension period. The legislation provides for automatic, mandatory and discretionary decision types for suspension (refer to the Legislative Decision Types section for further information). A suspension notice can be issued/served by operational police or by the Firearms Registry.

A suspension is only in place up until the expiry date specified on the suspension notice (an expiry date must be included on the suspension notice). Should you require the suspension to be in place for a longer period, you will need to issue a fresh suspension notice with a new expiry date.

The automatic suspension of a licence due to the making of an Interim Apprehended Violence Order (Interim AVO) automatically ceases to have effect upon the expiry of the Interim AVO. These files should be monitored accordingly. NB: If police/Registry staff hold concerns about the return of firearms and are considering revocation, a new suspension notice must be issued on alternate grounds prior to the expiry of the Interim AVO.

The decision to suspend a licence/permit is not a decision that can be reviewed internally by the Firearms Registry or the NSW Civil and Administrative Tribunal (NCAT or the Tribunal). However, licence/permit holders (or their legal representative) may send a letter to the Firearms Registry, outlining the reasons why the licence/permit should not be suspended.

The decision to revoke, monitor or lift a suspension on a licence/permit should be made at the earliest possible time. If the decision maker is satisfied that there are sufficient grounds for revocation based on legislation, information in events, fact sheets, police reports and other considerations (as documented in these guidelines), the licence should be revoked at that time, rather than waiting for charges to be laid or for the criminal charges to be finalised at court. A licence is not required to be suspended prior to revocation. If the licence/permit holder has firearms/prohibited weapons in his or her possession, an urgent revocation should be initiated.

WHAT IS A REFUSAL?

A refusal applies to new applications and reapplications and is a decision to refuse the applicant from obtaining a firearms licence/permit or from having their existing licence/permit re-issued. The legislation provides for both mandatory and discretionary decision types for refusal (refer to the Legislative Decision Types section for further information). A refusal notice can only be issued by the Firearms Registry and in instances where service of the notice is required (e.g. firearms in possession) the notice is served on the applicant by operational police.

The decision to refuse a licence/permit is a reviewable decision (other than a refusal in respect of a permit for a prohibited firearm).

WHAT IS A REVOCATION?

A revocation applies to existing licences/permits and is a decision to take away the authority to possess or use firearms/prohibited weapons that was previously granted. The legislation provides for automatic, mandatory and discretionary decision types for revocation (refer to the Legislative Decision Types section for further information). A revocation notice can only be issued by the Firearms Registry and in instances where service of the notice is required (e.g. firearms in possession) the notice is served on the person by operational police.

The decision to revoke a licence/permit is a reviewable decision (other than a revocation of a licence or permit on the basis of an Apprehended Violence Order or Firearms Prohibition Order).

WHAT IS A CONDITION?

A condition, in addition to the mandatory conditions specified in the legislation and regulations, can be applied to a licence/permit to impose a condition/s on the licence/permit. A condition notice can only be issued by the Firearms Registry and in

instances where service of the notice is required, the notice is served on the person by operational police.

Conditions are imposed for a variety of reasons and the most common conditions are:

- Security companies – restrict activities and number of firearms the business is authorised to possess
- Individual licence/permit holders - restrict firearms being stored at a location accessible by a named person (e.g. close family member with extensive criminal history).

The decision to impose a condition on a licence/permit is a reviewable decision.

WHAT IS AN INTERNAL REVIEW?

An internal review is where a person requests a review to be conducted by the Firearms Registry of a decision that is reviewable under **section 75** of the Firearms Act, **clause 154** of the Regulation and **section 35** of the Weapons Act: see also **section 53** of the *Administrative Decisions Review Act 1997*.

A request for an internal review must be made within 28 days of being notified of the reviewable decision.

The review is conducted by the Firearms Registry internal review staff; by a staff member that was not substantially involved in making the decision under review.

The decision maker conducting the review conducts an independent review of the original decision. The outcome may affirm (i.e. agree) with the decision, vary the decision, or set aside the decision and make a decision in substitution.

If the person is not satisfied with the outcome of the internal review, they may apply for an external review to be conducted by NCAT.

APPROPRIATE RECORDING OF DECISIONS

All decisions that require the decision maker to use their discretion must be documented in the decision-making checklist. Additionally, a decision log document, saved in the Firearms Management System (FMS), is used to record the reasoning behind the issuance of a licence and may include:

- Summary of incidents /offences etc
- Documentation reviewed (e.g. medical assessment on file etc)
- The factors that were taken into consideration
- Relevant legislation
- Legal precedent relied upon or referenced
- Other information relevant to your decision (e.g. advice sought, systems accessed etc)
- The decision, which clearly explains the reasoning for your decision.

In instances where you have decided to suspend, refuse, revoke or impose a condition, you must prepare a statement of reason using your decision made via the decision-making checklist. This statement does not require duplication into a decision log.

Remember: Your reasoning is the logical explanation for your decision and should refer to the factual findings and the information on which your findings are based. If your documented decision is read by someone who has not reviewed the matter, the reasons for your decision should be clear, concise and should allow the reader to understand how you reached your decision.

LEGISLATIVE DECISION TYPES

The legislation provides for the following three (3) decision types:

- Automatic
- Mandatory and
- Discretionary.

The below information provides examples of these legislative decision types.

The list is not exhaustive. It provides a general overview of some of the common refusal, suspension and revocation provisions for the above legislative decision types.

AUTOMATIC

The legislation contains **automatic** revocation provisions (e.g. **section 24(1)** of the Firearms Act). Upon the making of a certain order, or an action or event occurring, the licence/permit issued is automatically revoked by operation of legislation. No action is required by the Firearms Registry.

Although the licence/permit is automatically revoked, the Firearms Registry will still issue a revocation notice for procedural purposes.

Suspension (Automatic) – Interim Apprehended Violence Order

Section 23 of the Firearms Act

A licence is automatically suspended on the making of an interim apprehended violence order against the licence holder.

NOTE: The licence is suspended until the order is confirmed or revoked.

If the order is revoked, the suspension is automatically lifted. If the order is confirmed and a final apprehended violence order is made, the licence is revoked.

Revocation (Automatic) – firearms prohibition order & apprehended violence order

Section 24(1) of the Firearms Act (licence)

A firearms licence is automatically revoked if the holder becomes subject to:

- A firearms prohibition order
- An apprehended violence order.

Suspension (Automatic) – interim apprehended violence order

Section 17 of the Weapons Act

A permit is automatically suspended on the making of an interim apprehended violence order against the permit holder.

NOTE: The permit is suspended until the order is confirmed or revoked.

If the order is revoked, the suspension is automatically lifted. If the order is confirmed and a final apprehended violence order is made, the licence is revoked.

Revocation (Automatic) – weapons prohibition order & apprehended violence order

Section 18(1) of the Weapons Act (weapons permit)

A prohibited weapons permit is automatically revoked if the holder becomes subject to:

- A weapons prohibition order
- An apprehended violence order.

Revocation (Automatic) – off-duty pistol permit – ceased employment

Clause 85(7) of the Firearms Regulation

A person's authorisation to possess a pistol when off-duty is automatically revoked when the employee ceases employment with the employer nominated in the permit application.

MANDATORY

The legislation provides for **mandatory** refusal, suspension and revocation in certain circumstances. If a decision is mandatory, the decision maker's role is to verify that the statutory criteria have been met. If satisfied that those criteria have been met, the decision maker must make the decision required by law.

A decision to refuse, suspend or revoke a licence/permit on mandatory grounds requires no deliberation on the part of the decision maker.

TIP

Mandatory decisions in legislation have the words "must", "shall" or "will". This means there is no other possible decision to be made. For example, **section 11(5)(a)** of the Firearms Act provides "A licence must not be issued to a person who is under the age of 18".

The decision maker's role is to verify whether the applicant's age is in fact under 18.

Refusal (Mandatory) – numerous provisions

Section 11 of the Firearms Act

An application for a firearms licence/permit must be refused if the applicant falls within certain categories. The below list can be found at **section 11(5)** of the Act. A licence must be refused if the applicant:

- Is under the age of 18
- Is not a resident of NSW (or is not about to become a resident of NSW)
- Has not completed the required firearms safety training course
- Has been convicted in NSW or elsewhere of a prescribed offence within the period of 10 years before the application for the licence was made (see prescribed offence section)
- Is subject to a good behaviour bond for a prescribed offence, whether entered into in NSW or elsewhere
- Is subject to an Apprehended Violence Order (AVO) or has been subject to an AVO within the 10 years prior to making the application (other than an AVO that has been revoked). NOTE: the mandatory 10-year period commences on the expiry of the AVO
- Is subject to an interim AVO
- Is subject to a firearms prohibition order.

Is a registrable person or corresponding registrable person under the *Child Protection (Offenders Registration) Act 2000*

Also consider similar provisions under **section 29** of the Firearms Act (firearm permit) and **section 10** of the Weapons Act (prohibited weapon permit).

Revocation (Mandatory) – armed security guard

Section 24(1A) of the Firearms Act

A firearms licence issued to an armed security guard must be revoked in the following circumstances:

- The armed security guard fails to undertake any firearm safety training required under the Firearms Act or Regulation (i.e. yearly firearms accreditation), or
- The holder of a 1F licence or a visitor permit issued under the *Security Industry Act 1997* authorising the licensee carry out security activities of a kind authorised by a 1F licence:
 - is revoked, or
 - the armed security guard contravenes any condition of their firearms licence.

Suspension (Mandatory) – domestic violence offence

Section 22(2) of the Firearms Act

A firearms licence must be suspended if the Commissioner is aware that the licensee has been charged with a domestic violence offence within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007* or if there is reasonable cause to believe that the licensee has committed or threatened to commit a domestic violence offence.

DISCRETIONARY

The legislation also includes several discretionary grounds on which the Commissioner may refuse, suspend, revoke or impose a condition on a licence/permit. All discretionary decisions require a full and thorough consideration and determination to be made on the part of the decision maker.

TIP

Discretionary decisions in legislation have the words “may” or “should” or “would”. Unlike mandatory provisions, which demand one outcome, discretionary provisions have the potential for multiple outcomes. For example, **section 11(1)** provides “The Commissioner may issue a licence in respect of an application, or refuse any such application”. In this respect, a licence may be approved or refused depending on assessment of the adjudicator.

NOTE: The majority of discretionary decisions require a consideration of the public interest or the fit and proper tests.

Public interest: when considering public interest, the adjudicator looks broadly at a person, their behaviour, environment, history, and assesses whether they can be satisfied that they pose virtually no risk to the public.

Fit and proper: when considering the fit and proper test, the adjudicator looks at the person, their behaviour, environment, history, and assesses whether the person can be trusted to be in possession of a firearm.

While these two tests are very similar, we tend to use public interest when their behaviour may place risk to others and use fit and proper when their behaviour demonstrates unsuitability to be in possession of firearms.

Detailed information is found on these grounds in the public interest and not a fit and proper person sections.

Suspension (Discretionary) – if there are grounds for revocation

Section 22(1) of the Firearms Act (licence)

Section 30(5) of the Firearms Act in conjunction with section 22(1) of the Firearms Act (permit)

A licence may be suspended if the Commissioner is satisfied there may be grounds for revoking the licence.

Refusal (Discretionary) – public interest

Section 11(7) of the Firearms Act (licence)

Section 29(4) of the Firearms Act (permit)

A licence/permit may be refused if the Commissioner considers that issue of the licence/permit would be contrary to the public interest.

NOTE: A licence **must** be refused if the Commissioner is of the opinion, having regard to any criminal intelligence report or other criminal information held in relation to the person, that the person is a risk to public safety, and the issuing of the licence would be contrary to the public interest: s. 11(5A) of the Firearms Act. Only the Commissioner can refuse a licence under s. 11(5A), as the power to refuse a licence under that section is not delegable: s. 81(1) of the Firearms Act.

Refusal (Discretionary) – other grounds

Section 11 of the Firearms Act (licence)

A licence must not be granted unless the Commission is satisfied of the matters set out in **section 11(3)**. In other words, a licence must be refused if the Commissioner is not satisfied that the applicant:

- is a fit and proper person to possess firearms without danger to public safety as well as the following
 - i. in the case of a person who has never held a licence (including a firearms licence under a previous Act), the applicant has completed, to the satisfaction of the Commissioner, such firearms training and safety courses as are prescribed by the regulations in respect of the licence concerned, and
 - ii. the storage and safety requirements set out in Part 4 are capable of being met by the applicant, and
 - iii. the person is a resident of NSW (or is about to become a resident of NSW).

A licence also must be refused under **section 11(4)** if there is reasonable cause to believe that the applicant may not personally exercise continuous and responsible control over firearms because of:

- i. The applicant's way of living or domestic circumstances, or
- ii. Any previous attempt by the applicant to commit suicide or cause a self-inflicted injury, or
- iii. The applicant's intemperate habits or being of unsound mind.

The fit and proper person test, as well as the three factors in **section 11(4)**, require the decision maker to exercise discretion and are discussed in more detail below.

See also Section 29 of the Firearms Act (permit)

The above legislative refusal provisions are mandatory refusal provisions (legislative provision states “*must*”). However, as a value judgement is involved when determining whether the criteria are satisfied, they have been listed in the discretionary component of these guidelines.

TIP

Way of living or domestic circumstances: this requires a consideration of a relationship and an assessment of any risk posed by the relationship. This is particularly prevalent where people are in an ongoing domestic violence relationship, but they continue to reside together. This information comes from COPS holdings, notifications directed to the office and intelligence.

Attempted suicide or cause self-inflicted injury: This information comes from disclosure on applications, COPS holdings, intelligence, **section 79** medical notifications and information from the public.

Intemperate habits or unsound mind: An example of this is drug and alcohol dependency or ongoing, severe mental health problems. As with above, evidence is required.

With all these grounds, the adjudicator must determine whether the applicant is not personally able to exercise continuous responsible control over firearms in light of the evidence.

More information can be found in the discretionary decision-making section

Revocation (Discretionary) – any reason for which licence required to be refused

Section 24(2)(a) of the Firearms Act

A licence may be revoked for any reason for which the licensee would be required to be refused a licence of the same kind.

NOTE: A common example is where a licensee's licence is revoked because the person has been convicted of a prescribed offence.

Revocation (Discretionary) – contravene legislation or licence condition

Section 24(2)(b) of the Firearms Act

A licence may be revoked if the licensee:

- supplied information which was (to the licensee’s knowledge) false or misleading in a material particular in, or in connection with, the application for the licence; or
- contravenes any provision of the Firearms Act or the regulations, whether or not the licensee has been convicted of the offence; or
- If the licensee contravenes any condition of the licence.

Example 1: A club member has failed to complete their participation requirements under **clause 105** but has explained to the Firearms Registry that they had been in intensive chemotherapy treatment for 12 months. The individual has an otherwise compliant licensing history.

This is an example where the adjudicator may consider not revoking a licence.

Example 2: A police officer attends a rural property and identifies a licence holder heavily intoxicated and discharging a firearm. The individual has an otherwise compliant licensing history.

This is an example where, despite the unblemished history, the conduct is serious enough to justify a revocation of the licence.

Example 3: Jameson v Commissioner of Police, New South Wales Police Force [2019] NSWCATAD 25

Mr Jameson’s category ABH firearms licence was revoked after a locked metal box containing five of his pistols was stolen from the boot of his car. At the time, his car was parked in his unlocked garage.

Despite the very serious nature of Mr Jameson’s breach of safe storage regulations, several factors counted towards the Tribunal’s decision to set aside the Commissioner’s decision to revoke the licence. These included:

- His otherwise unblemished record in relation to firearms and general law
- His immediate contacting of police and acceptance of full responsibility
- His prompt and effective upgrade of security precautions at his house and
- His high reputation in the community and pistol shooting circles.

Revocation (Discretionary) – no longer a fit and proper person

Section 24(2)(c) of the Firearms Act

A licence may be revoked if the Commissioner is of the opinion that the licensee is no longer a fit and proper person to hold a licence.

Revocation (Discretionary) – public interest

Clause 20 of the Firearms Regulation

A licence may be revoked if the Commissioner is satisfied that it is not in the public interest for the licensee to continue to hold the licence.

Conditions (Discretionary) - Section 19(1) of the Firearms Act (licence) and clause 25(1)(a) of the Firearms Regulation (permit)

- A **licence** may be issued subject to such conditions as the Commissioner thinks fit
- A **permit** is subject to such conditions as the Commissioner thinks fit to impose and as are specified in the permit.

TIP:

The Firearms Registry may impose a range of conditions on a licence. Despite there being no specific guidelines in the legislation about the types of conditions, generally the conditions imposed are about restricting use, storage, access, numbers (volume e.g. security firms).

These conditions are additional to the conditions outlined in the Act and Regulation.

A condition can be imposed on a licence or permit at the time of issue or at any time throughout the duration of the authority.

Conditions can be used to address a concern instead of revoking a licence (see example 1).

Example 1: Father is a long-term licensee. The son nominates the father's address as place of residence upon being released on parole. The Firearms Registry can impose a condition on the father's licence to store his firearms at an alternate safe keeping location.

Example 2: Smith v Commissioner of Police, NSW Police Force [2018] NSWCATAD 282

Mr Smith's ABC firearms licence was revoked after police officers discovered two unregistered and unsecured airguns leaning on the inside wall of his firearms safe. One ground the Commissioner relied upon to have the revocation affirmed was that the Applicant's son, who suffered from mental illness and drug addiction, resided at the home.

Due to the historically responsible attitude Mr Smith demonstrated towards his firearms, as well as the anxiety he expressed about having to kill injured vermin without firearms, the Tribunal determined that it was appropriate to set aside the revocation and impose a condition on the licence.

This condition required Mr Smith to store his firearms at his brother's adjacent property, thereby giving him convenient access but negating the risk of his son handling the weapons.

LEGISLATIVE DECISION TYPES TABLE

AUTOMATIC DECISIONS			
Suspension	Refusal	Revocation	Conditions
Subject to an interim apprehended violence order (interim AVO)	Nil	Subject to firearms or weapons prohibition order (FPO) or (WPO)	Nil
		Subject to apprehended violence order (AVO)	
		Off-duty pistol permit – ceased employment	
MANDATORY DECISIONS			
Suspension	Refusal	Revocation	Conditions
Charged with domestic violence offence or there is reasonable cause to believe that a domestic violence offence has been committed or threatened to commit.	Is under the age of 18 (excludes minors permit)	Armed security guard – fails to undertake required firearm safety training	Nil
	Not a resident of NSW or about to become a resident of NSW (licence only)	Armed security guard - No longer holder of 1F licence or visitor permit	
	Not completed required firearm safety training course	Armed security guard - Contravene condition of firearms licence	
	Convicted of prescribed offence		
	Subject to good behaviour bond (GBB) for a prescribed offence		
	Subject to AVO within the last 10 years (other than order revoked)		
	Subject to an interim AVO		
	Subject to FPO / WPO		
Registrable person or corresponding registrable person			

LEGISLATIVE DECISION TYPES TABLE

DISCRETIONARY DECISIONS			
Suspension	Refusal	Revocation	Conditions
If satisfied there may be grounds for revocation	Not in the public interest	Any reason for which the licence may be refused	Impose such conditions as the Commissioner thinks fit
	Not a fit and proper person (mandatory but involves a value judgement)	Contravene the Firearms Act or the Firearms Regulation	
	May not personally exercise continuous and responsible control of firearms due to way of living or domestic circumstances (mandatory but involves a value judgement)	Contravene condition of licence	
	May not personally exercise continuous and responsible control of firearms due to a previous attempt to commit suicide or cause a self-inflicted injury (mandatory but involves a value judgement)	Not a fit and proper person	
	May not personally exercise continuous and responsible control of firearms due to intemperate habits or being of unsound mind (mandatory but involves a value judgement)	Not in the public interest	
	Capable of meeting storage and safety requirements (mandatory but involves a value judgement)		

NOTE: The tables above are not exhaustive. However, the most common refusal, suspension, revocation and special condition provisions for the different legislative decision types (automatic, mandatory, discretionary) are provided.

GUIDE TO DISCRETIONARY DECISION MAKING

Overview

As highlighted above, discretionary decisions are those where the relevant legislation provides that you may refuse, suspend, revoke or impose a special condition on a licence/permit. All discretionary decisions require a full and thorough consideration and determination to be made on the part of the decision maker.

The legislation provides for several mandatory grounds of refusal, which can be applied to new licence applicants. However, these mandatory grounds of refusal become discretionary grounds for revocation for existing licence holders.

The information in this section outlines a non-exhaustive list of factors that you, as the decision maker, can consider when making a discretionary decision.

To reach a decision where discretion exists you must consider and weigh (i.e. balance) several factors, including: the competing interests of the applicant/customer against the underlying principles of the Act (overriding need to ensure public safety) and any other factor set out in the legislative provisions. In doing so, you should consider recent NCAT authority.

Balance of Probabilities

In exercising your discretion to make an administrative decision you are doing so to the 'civil standard of proof'. The burdens (or standards) of proof in Australian legal system are:

- Balance of probabilities (as in, "more likely than not") – civil standard
- Beyond reasonable doubt (as in, "so that you are sure") – criminal standard.

The civil standard of proof is different from the criminal standard of proof. In civil matters, the decision maker needs to be satisfied that it is more likely than not that an event occurred. This is done by balancing the probabilities. In criminal cases, the decision maker needs to be satisfied beyond reasonable doubt; a much higher standard of satisfaction.

In making licensing or permit decisions, you can use material considered in a criminal proceeding and apply the civil standard rather than the criminal standard. Even where a charge has been dismissed based on the criminal standard, the fact that the offence occurred may still be proved to the civil standard: *Humphrys v Commissioner of Police* [2009] NSWADT 58 at para 46; *Hardy v Commissioner of Police* [2006] NSWADT 167 at para 17.

In *Joseph v NSW Commissioner of Police* [2017] NSWCA 31, the Court of Appeal heard an appeal from the Appeal Panel of NCAT, which affirmed the Commissioner's decision to refuse a firearms dealer licence on the basis of alleged fraudulent conduct. Charges were brought but dismissed at trial. The Court held that the evidence established, at least on the balance of probabilities, that the applicant had engaged in fraudulent conduct, and that the Appeal Panel could consider this evidence after applying a lesser standard of proof than the criminal standard: at para 60, citing *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at paras 32-33.

In *Mewburn v Commissioner of Police* [2009] NSWADT 24 at para 51, the Administrative Decisions Tribunal (ADT), which has now been replaced by NCAT or the Tribunal, said that "there are many circumstances where a court will find a fact proven but not proceed to a conviction or where the criminal standard is not met and a matter is dismissed". Despite the fact there has been no proven criminal accountability, the decision maker may still take into account the related conduct of the applicant.

State of satisfaction

Many of the provisions in the Firearms Act and the Weapons Act require the Commissioner (or the Commissioner's delegate) to be "satisfied" of something, that is, reach a state of satisfaction.

A decision-maker's satisfaction comes from deciding whether, upon the facts and the law, the conditions of the relevant statute have been fulfilled: *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (1949) 78 CLR 353 at 363. The High Court said at 360:

"If a decision maker "does not address himself to the question which the... [Statute]... formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review."

Reaching a state of “satisfaction” requires the decision-maker to correctly interpret the law and apply it to the facts of a particular case.

Relevant factors

These guidelines consider the following most common discretionary decision types and outline a non-exhaustive list of factors you can consider in your deliberation:

- Public interest
- Fit and Proper person
- “Way of living or domestic circumstances”
- “Previous attempt by the applicant to commit suicide or cause a self-inflicted injury”
- “Intemperate habits or being of unsound mind”
- Capable of complying with safe storage requirements.

You will need to consider all relevant factors and evidence involved when making a decision. Suggestions have been included in this guide, based on the provision on which the decision is being made. There may be other factors, depending on the circumstances of the particular decision.

THE PUBLIC INTEREST

What is “the public interest”?

The “public interest” is a central concept in administrative decision making. It is not possible to comprehensively define the concept and its meaning will always depend on the specific statutory context in which it is used. At its core, a “public interest” test involves a consideration of the interests of the whole community, not just the interests of a particular individual: see *Comalco Aluminium (Bell Bay) Ltd v O'Connor* (1995) ALR 657 at 681. The factors to consider include public protection, public safety and public confidence in the administration of the licensing system: *Constantin v Commissioner of Police, New South Wales Police Force* [2013] NSWADTAP 16 at para 33. Generally speaking, if the risk to the public outweighs the benefit to an individual, an administrative decision would not be in the public interest.

Importantly, **section 3** of both the Firearms Act and the Weapons Act emphasises that firearm or weapons possession and use is a privilege conditional on the overriding need to ensure public safety. In this statutory context, the community’s interests take precedence over the private interests of an individual: see, for example, *Crowther v Commissioner of Police, NSW Police Force* [2017] NSWCATAD 62 at para 46.

Public safety is not confined to the public at large. Public safety could be endangered by a risk to one or two persons.

Leading case: The “virtually no risk” test

The Tribunal has applied a strict test to the public interest and public safety under the Firearms Act. In *Ward v Commissioner of Police, NSW Police Force* [2002] NSWADT 28, Deputy President Hennessy said that in terms of public safety at paras 27-28:

“...The question for the Tribunal is whether, based on all the evidence, it would have confidence that Mr Ward would not pose a risk to public safety if he had access to firearms.

The Tribunal could never be totally satisfied that a person would not pose any risk to public safety if they were given access to a firearm. However, in the context of the Act, the tribunal must be satisfied that there is virtually no risk.”

Leading case: the “public interest” looks beyond the person’s character and interests

Hill v Commissioner of Police, New South Wales Police Service [2002] NSWADT 218

- Mr Hill’s firearms licence was revoked after his son accidentally shot a friend in the leg while hunting feral pigs. It was not contested that the Applicant was a “fit and proper” person to hold a licence: para 28
- The Tribunal therefore had to look beyond the Applicant’s good character. It was observed that he had, on several occasions, allowed unlicensed minors to use his firearms. This propensity to disregard firearms regulations was

viewed as too great a threat to public safety to allow for the reinstatement of his licence: paras 24-29.

See also: *Commissioner of Police v Toleafoa* [1999] NSWADTAP 9 at para 25.

Factors to consider

When deliberating on the basis that it would not be in the public interest for the person to have access to firearms or weapons, the following factors (as well as anything else you consider relevant) can be taken into consideration when making your determination:

- **Public safety is the priority** - the interest of the public at large takes precedent over the private interests of the person affected by the decision
- **Who is the victim of the offence?** - has an offence/incident been committed against a member of the public?
- **Did the offence/incident place the public's safety at risk?** - if so, at what level was the public safety compromised? (e.g. extremely serious vs slightly serious)
- **Location of offence/incident** – e.g. did the offence/incident take place in the public domain and if so, was the safety of the public placed at significant risk?
- **Is there a nexus between the offence/incident and doubts about their ability to responsibly possess and use firearms?** – e.g. did the offence/incident involve or relate to the use of a firearm or weapon?
- **Public opinion** - would the public consider it reasonably appropriate and feel secure in the knowledge that the individual under notice has access to firearms?
- **The number of offences/incidents** – i.e. did the person commit one or multiple offences/incidents?
- **The circumstances surrounding the offence/incident** – e.g. accidental, premeditated, blatant behaviour etc
- **The period since the last offence/incident** e.g. has there been a reasonable length of time since the last offence/incident that you could assume that the behaviour or pattern of behaviour has ceased?
- **Insight into past conduct / rehabilitation** – Has the person provided any evidence of insight into past offending conduct, or rehabilitation into the community?
- **Any relevant court outcomes** – if a prior decision has been made to await the outcome of the court result before making a determination, the court result becomes very relevant in the decision-making process (conviction vs finding of guilt vs withdrawal / dismissal)
- **Length of time licence held** – i.e. has the person held a licence for a significant period without coming to adverse notice?
- **Age of the applicant/licensee** - is it conduct that can be partially explained due to the person's age and level of maturity?

In circumstances where someone has come to notice for a prescribed offence, domestic violence or a serious, but not a prescribed offence, but they have not met the mandatory disqualification threshold, an adjudicator may consider disqualifying them under public interest grounds.

Example 1: Police conduct a safe storage inspection and one of the bolts of the safe is loose but otherwise the safe is compliant. Police are satisfied the breach can be immediately rectified and the person has an otherwise compliant licensing history.

This would be an example of where discretion may be exercised to allow the licence to remain rather than proceed to suspension.

Example 2: Police respond to a domestic incident, conduct a search of the premises and firearms were located unsafely kept and additional unregistered firearms were found in possession.

This would be a strong example of a scenario in which the licence may be suspended or revoked.

You can consider the above factors (as well as any other relevant factors), and relevant Tribunal or Court decisions, when deciding whether it would be in the public interest for a person to have (or continue to have) possession of firearms or prohibited weapons.

To assist, relevant case law is set out below under the following headings, noting that many of these categories overlap:

- Outlaw Motorcycle Gang (OMCG) membership and association
- Mental health
- Criminal history
- Apprehended violence orders
- Non-compliance with licensing requirements
- Dishonesty
- Drug use.

OMCG membership and association

Cory v Commissioner of Police, New South Wales Police Force [2019] NSWCATAD 32

- Mr Cory was found to be a fit and proper person to hold a firearms licence, despite his membership of an OMCG
- However, having regard to factors beyond Mr Cory's character, the Tribunal upheld the decision to refuse to issue a firearms licence to Mr Cory on the basis that it was not in the public interest to have an active member of an OMCG in possession of a category A, B and C licence.

Adams v Commissioner of Police, NSW Police Force [2017] NSWCATAD 194

- The potential for an OMCG to influence a person is a relevant consideration
- "Although there is no evidence that the applicant has personally engaged in any drug dealing, firearms trafficking, violence or similar criminal activities, he could, as the respondent contends, come under pressure to make guns or ammunition available to members of the Outcasts if he continues to associate with them." [90]

Mental Health

Clay v Commissioner of Police, NSW Police Force [2018] NSWCATAD 49

- The applicant sought a Category AB firearms licence but was refused on the basis that he had formerly been diagnosed with Borderline Personality Disorder (BPD) and that a relapse was possible
- The Tribunal set aside the Commissioner's decision in light of the fact that the applicant had not shown any symptoms of BPD for several years since his diagnosis. Additionally, a condition was found to be unnecessary, as it was noted that it would require the applicant or psychologist to regularly report to the Registry. The Tribunal considered this proposal to be unworkable [37]-[41].

Beaman v Commissioner of Police, NSW Police Force [2017] NSWCATAD 129

- Mr Beaman's licence was revoked for numerous reasons, the most important being mental health. Mr Beaman suffered from paranoia and had a specific fixation on the activities of police
- The Tribunal determined that these mental health issues existed on the basis of recent evidence given by QLD Police and a psychiatrist who had examined the applicant. The Tribunal affirmed the Commissioner's decision on the grounds that, considering the presence of these mental health issues, they were not satisfied that there was "virtually no risk" to public safety and that it was accordingly outside the public interest to reinstate the licence: [37]-[39].

NOTE: Mr Beaman's appeal to the Appeal Panel was dismissed: *Beaman v Commissioner of Police, NSW Police Force* [2018] NSWCATAP 12

Fistr v Commissioner of Police, New South Wales Police Force [2019] NSWCATAD 46

- Depending on the evidence and circumstances, mental health concerns may not always act against the applicant
- The Tribunal cited with approval the case of *Wright v Commissioner for Fair Trading* [2017] NSWCATAD 98, which dealt with public interest considerations under the tattoo licencing regime
- Relevantly, the Tribunal in *Wright* held that, where the issuing of a licence will assist the licensee with their rehabilitation or integration into society, it may be considered in the public interest to grant the licence

- In *Fistr*, it was considered in the public interest to facilitate Mr Fistr's participation in paintball competitions, which the Tribunal viewed as beneficial to his mental health.

NOTE: Paintball marker permits are now issued under the *Paintball Act 2018*.

Criminal History

CXJ v Commissioner of Police [2017] NSWCATAD 39

- A long criminal history is indicative of it being against the public interest for a person to hold a firearms licence
- In this case, a licence application was refused due to the applicant's lengthy criminal history (from 1989 to 2007). This history included many traffic offences, altercations with others and offences of dishonesty
- Referring to the Court of Appeal's decision in *Lee v Health Care Complaints Commission* [2002] NSWCA, the Tribunal noted that mere passage of time is not enough to prove reformation of character. Therefore, the fact the applicant's last conviction was in 2007 did not automatically negate the impact of his record: [68]
- Ultimately, the applicant's demonstrated willingness to be dishonest with authorities and his disregard for legislative schemes promoting public safety, prevented the Tribunal from being satisfied that there would be virtually no risk to the public safety if he possessed a firearms licence: [71]-[72].

El-Ashrafi v Commissioner of Police, NSW Police Force [2017] NSWCATAD 103

- Mr El-Ashrafi's firearms licence was revoked on the basis that past criminal charges for violent offences and a long list of traffic offences rendered him incapable of exercising continuous and responsible control over his firearms. Additionally, it was considered to not be in the public interest to reinstate his licence
- In affirming the Commissioner's decision to revoke the licence, the Tribunal rejected the applicant's argument that his prior criminal charges were irrelevant considering no convictions were recorded. The Tribunal noted that in administrative decisions, criminal charges can be proven on the balance of probabilities; a standard of proof that was satisfied in the current case.

Apprehended Violence Orders

Jubian v Commissioner of Police, NSW Police Force [2019] NSWCATAD 70

- The Tribunal affirmed the Commissioner's decision to impose conditions on the Applicant's firearm licence after it was suspended. The suspension followed a verbal argument between Mr Jubian and his wife that required Police intervention
- The two AVOs previously issued against Mr Jubian, as well as numerous relationship disputes that came to the attention of NSW Police, prevented the Tribunal from being satisfied that there was "virtually no risk" to public safety if conditions weren't imposed on his licence: [82]-[86].

Economides v Commissioner of Police, New South Wales Police Force [2014] NSWCATAD 128

- Although there was no evidence the Mr Economides had engaged in physical violence, his willingness to threaten and intimidate made him the subject of numerous AVOs
- He was also diagnosed with Type 1 Diabetes and it was held that during his periods of hypoglycaemia, it would be very difficult for him to refrain from intimidating others and threatening violence. It was accordingly held to be in the public interest not to renew his firearms licence: [79]-[84].

Non-Compliance with Licensing Requirements

McGrath v Commissioner of Police, NSW Police Force [2019] NSWCATAD 98

- The Commissioner's decision to revoke Mr McGrath's firearms licence was set aside on the proviso that he demonstrates a resolve to comply with safe storage regulations: [68]
- Not only was it found that public interest concerns did not warrant the revocation of the licence, but that it was actually in the public interest to have "law abiding primary producers holding firearms licences" for the purpose of culling vermin on their properties: [66].

DMC v Commissioner of Police, NSW Police Force [2018] NSWCATAD 219

- Tribunal affirmed the Commissioner’s decision to revoke the applicant’s licence after he allowed unlicensed minors to use his air rifle
- There was a perceived lack of “accuracy, candour and frankness” in the information provided to the Tribunal by the applicant. The Tribunal held it was in the public interest to revoke the licence of someone who demonstrates a disregard for the seriousness of the firearms licencing regime: [58]-[61].

Commissioner of Police, NSW Police Force v Lee [2016] NSWCATAP 234

- In this case, the Appeal Panel of the Tribunal noted that “*there is no distinction in the legislation between firearms used for paintball and other firearms. But the **type of firearms** involved in an infringement and its potential to cause injury or death, is not an irrelevant consideration when exercising the public interest discretion*”: [98].

Lee v Commissioner of Police, NSW Police Force [2015] NSWCATAD 254

- The Tribunal indicated that safety is not the only concern relating to the public interest test. This test also involves promoting public confidence in the effectiveness of the firearm licencing scheme: [199]
- Although the applicant posed virtually no risk to public safety, Mr Lee’s disregard for certain firearms regulations was seen as capable of degrading public confidence in licensee compliance with the Act: [206].

NOTE: In this particular matter, the Tribunal affirmed the Commissioner’s decision to revoke Mr Lee’s Theatrical and Dealer licence. His personal licence was subsequently revoked by the Appeal Panel in *Commissioner of Police, NSW Police Force v Lee* [2016] NSWCATAP 234.

Dishonesty / lack of frankness

Weckert v Commissioner of Police, NSW Police Force [2011] NSWADT 197

- Mr Weckert provided false or misleading material in his application for a firearms licence (a reference that Mr Weckert would have known the referee did not agree with)
- Despite holding that the applicant posed virtually no risk to public safety if Mr Weckert were to regain his firearms licence and firearms, the Tribunal held that the “public interest” requires that licensees provide accurate information in regard to their applications: [63]
- “The success of the firearms licencing regime is dependent on that occurring. The Applicant’s individual interest in retaining his licence must be subordinate to the public interest in ensuring the success of that regime.”

DMC v Commissioner of Police, NSW Police Force [2018] NSWCATAD 219

- The level of co-operation and frankness demonstrated by a licensee in dealings with the regulator is indicative of the licensee’s character: [57]
- The applicant’s conduct and lack of understanding of the need for accuracy, candour and frankness led the Tribunal to conclude that it was not in the public interest for the applicant to continue to hold the licence: [60].

CXJ v Commissioner of Police [2017] NSWCATAD 39

- The Tribunal upheld the Commissioner’s decision that it was not in the public interest to issue the applicant with a firearms licence
- The Tribunal found that the applicant demonstrated a lack of candour in his interactions with the police investigation in relation to a stabbing offence in 2006 and had failed to demonstrate insight into this behaviour to the Tribunal
- The Tribunal held:

“This approach is problematic as far as the privilege of firearms licensing is concerned. It is insufficient to be evasive in telling the truth. The Tribunal would expect a firearms licensee to demonstrate a greater degree of disclosure and cooperation when questioned by the police

in relation to a serious matter. CXJ had an opportunity in his evidence before this Tribunal to indicate that he might now behave differently were he involved in police investigations of a serious matter. However, he did not.”: [70].

Drug use

Tannous v Commissioner of Police, NSW Police Force [2011] NSWADT 116

- The Tribunal noted that convictions for minor drug possession charges do not attract mandatory revocation of firearms licences: [33]
- However, they noted that such offences can certainly form part of the overall circumstances that decision-makers can consider when determining whether it is in the public interest to grant someone a firearms licence: [33]
- In the present case, while Mr Tannous was convicted of possession for only a small amount of methamphetamine and cocaine, this offence contributed (along with other factors) to the picture of the applicant as someone who had shown a disregard for laws which protect public safety. It was held not to be in the public interest to reinstate his licence: [37]-[38].

“FIT AND PROPER PERSON”

Overview

Whether an individual is considered a “fit and proper” person to possess and use firearms primarily involves an assessment of the individual’s character. It also extends to whether or not the person has demonstrated their ability to be trusted to have unfettered access to firearms and to uphold the associated legislative obligations.

In *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11, the High Court said at 65:

“The expression “fit and proper person”, standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of “fit and proper” cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive, but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question”.

A person’s fitness is to be gauged in light of the nature and purpose of the activities that the person will undertake: *Hughes and Vale Pty Ltd v New South Wales* (No. 2) (1955) 93 CLR 127. Knowledge, ability, moral integrity and the rectitude of character necessary to fulfil the role for which a licence is sought are proper considerations: *Sobey v Commercial and Private Agents Board* 20 SASR 70.

Leading case: *Ward v Commissioner of Police, New South Wales Police Service* [2000] NSWADT 28

- Mr Ward’s firearms licence was revoked after he was issued with an AVO in relation to charges of assault against his wife, for which he was subsequently convicted
- Despite the violent nature of his offence, Mr Ward’s remorse, determination not to reoffend, extensive experience with firearms and otherwise unblemished criminal record, prompted the Tribunal to label him a “fit and proper person” to hold a firearms licence: [30]-[31]
- It was noted that consideration had to be given to the circumstances surrounding his conviction for assault: [27].

(**Note:** the Tribunal nonetheless found that it was not in the public interest for Mr Ward to use and possess a firearm.)

Leading case: *Barlow v Commissioner of Police, New South Wales Police Service* [2003] NSWADT 254

- “The fitness and propriety of a person under the [Firearms] Act must be considered in the context of at all times ensuring the public safety.”: [22].

Factors to consider

When deliberating on the basis that a person is not a fit and proper person, the following factors should be taken into consideration when making your determination:

- **The apparent integrity of the individual** - including honesty, knowledge and ability
- **Relevant personal details** – e.g. the age of the person
- Does there appear to be a **significant flaw in his/her character** that can be reasonably assumed by known information and/or history
- **Has improper conduct occurred?** - e.g. did the actions of the person put the public safety at risk?
- **Is the improper conduct likely to occur again** or can you assume that it will not occur again - e.g. is this a series of events relating to the same period and pressure or is it clearly a continuous pattern of behaviour over an extended period of time?
- **The number of offences/incidents** – i.e. did the person commit one or multiple offences/incidents?
- **Is there a propensity towards offending?** i.e. does the history of the offences/incidents highlight low morality and self-control?
- **The time over which the offences/incidents have occurred** e.g. continually occurred over a significant period occurred during a short period of time?
- **The period since the last offence/incident** e.g. has there been a reasonable length of time since the last offence/incident that may suggest that the behaviour or pattern of behaviour has ceased?
- **The nature of the offence/incident** - e.g. dishonesty type offences/incidents and offences/incidents which raise doubt as to the individual's rectitude or character or offences/incidents that point to the individual's lack of respect for authority
- **The circumstances surrounding the offence/incident** – e.g. accidental, premeditated, blatant behaviour and/or apparent disregard for the law etc
- **Any relevant court outcomes** – if a prior decision has been made to await the outcome of the court result before making a determination, the court result becomes very relevant in the decision-making process (conviction vs finding of guilt vs withdrawal / dismissal)
- **Length of time licence held** – i.e. has the person held a licence for a significant period without coming to adverse notice?
- **Insight into past conduct / rehabilitation** – Has the person provided any evidence of insight into past offending conduct, or rehabilitation into the community?
- **Can it be said that the person can be trusted to adhere and abide by the legislative obligations associated with being licensed for firearms/weapons?**

In circumstances where someone has come to notice for mental health, domestic violence or behaviour (or offences) relating to the character of the person, but they have not met the mandatory disqualification threshold, an adjudicator may consider disqualifying them under fit and proper grounds.

You can consider the above factors (as well as any other relevant factors), and relevant Tribunal or Court decisions, when deciding whether the person is a fit and proper person and can be trusted to have (or continue to have) possession of firearms without danger to public safety or to the peace.

To assist, relevant case law is set out below under the following headings, noting that many of these categories overlap:

- Outlaw Motorcycle Gang (OMCG) membership and association
- Mental health
- Criminal history
- Apprehended violence orders
- Non-compliance with licensing requirements
- Drug use.

Case law

OMCG Membership or Association

Cory v Commissioner of Police, New South Wales Police Force [2019] NSWCATAD 32

- The Applicant in this case was a member of the Gladiators OMCG. The Tribunal was satisfied that the nature of his membership was largely innocuous and that it did not automatically render him not “fit and proper” to hold a firearms licence: [96]-[107].

Adams v Commissioner of Police, NSW Police Force [2017] NSWCATAD 194

- On a similar set of facts to Cory, the Tribunal found Mr Adams was not “fit and proper” to hold a firearms licence by virtue of his membership with the Outcasts OMCG: [90]
- The difference between this case and Cory appears to be the degree of criminality between the Outcasts and the Gladiators; the latter being only vaguely associated with criminal activity: [103].

Sciberras v Commissioner of Police New South Wales Police Force [2015] NSWCATAD 206

- Mr Sciberras was no longer a member of an OMCG and had no criminal record, however his associations with current members were a concern
- For this reason, he was deemed “fit and proper” to hold a conditional firearms licence.

Mental Health

DWH v Commissioner of Police, NSW Police Force [2019] NSWCATAD 125

- The applicant’s firearms licence was revoked due to concerns about his deteriorating mental health
- In finding that the applicant was a “fit and proper person”, the Tribunal placed significant weight on the Commissioner’s failure to conclusively prove the existence of any psychiatric illness: [87].

Fistr v Commissioner of Police, New South Wales Police Force [2019] NSWCATAD 46

- The Applicant in this matter was deemed to be a “fit and proper person” to hold a paintball gun permit. The Commissioner submitted evidence of occasional threats of violence and self-harm, but the Tribunal attributed this conduct to acute and reasonable distress brought on by a marriage break-down
- As was the case in DWH, significant weight was given to the lack of any diagnosis of a mental illness.

Warner v Commissioner of Police, NSW Police Force [2019] NSWCATAD 146

- Mr Warner’s firearms licence was revoked after he threatened his neighbour during a dispute. The threat notably involved Mr Warner telling his son to “go and get the shotgun”
- The Tribunal found the applicant was not a “fit and proper person” to hold a firearms licence, despite being unable to conclusively determine whether he suffered from Major Depressive Disorder
- His inability to appreciate the gravity of his threats indicated to the Tribunal that, without continuing psychological assistance, there was a likelihood that he would demonstrate a similar incapacity to control his anger in future disputes: [104].

Criminal History

Oliver v Commissioner of Police, NSW Police Force [2017] NSWCATAD 95

- Mr Oliver’s firearms licence was revoked after he failed to comply with certain regulations. In support of their decision, the Respondent argued that, in determining whether he was a “fit and proper person” to hold a licence, regard should be had to his criminal history
- The Tribunal determined that his offences were too few, minor and distant in the past to be relevant to the “fit and proper person” test: [46].

Maguire v Commissioner of Police, NSW Police Force [2016] NSWCATAD 210

- The Commissioner relied heavily on Mr Maguire’s extensive criminal history in submitting that he was not a “fit and proper person” to hold a firearms licence
- The Tribunal noted, however, that his licence had been renewed several times in the past despite his criminal

record. As such, his criminal record was not sufficient on its own to see him considered not “fit and proper” to possess a firearms licence: [150].

Lane v Commissioner of Police, NSW Police Force [2013] NSWADT 85

- The Tribunal affirmed the Commissioner’s decision to refuse the relevant firearms licence application
- The close proximity of two violent offences committed by the Applicant to the lodging of the application, in addition to a long history of traffic offences, indicated that the Applicant was not a “fit and proper person” to hold a firearms licence: [67]-[73].

Apprehended Violence Orders

Mewburn v Commissioner of Police, NSW Police [2009] NSWADT 24

- The Applicant was refused a firearms licence on the basis that he was not a “fit and proper person” to hold the licence; a determination stemming from his past breach of an AVO and his history of involvement in domestic disputes
- In light of the fact that the Applicant had completely removed himself from the problematic relationship, the Tribunal did not see these factors as demonstrating the Applicant was not a “fit and proper person” to hold a licence: [50]-[54].

Non-compliance with licensing requirements

Davos v Commissioner of Police, NSW Police Force [2013] NSWADT

- The Tribunal had to determine whether the Applicant’s non-compliance with firearms regulations, including those dealing with triggers lock and certain prohibited weapons, warranted a determination that he was not a “fit and proper person” to hold a firearms licence
- The Tribunal determined that either the Applicant did not possess the requisite knowledge and understanding of his obligations under firearms regulations, or he simply did not care to comply with them. Both instances rendered him not “fit and proper” to hold a firearms licence: [117]-[118].

Drug use

Lane v Commissioner of Police, NSW Police Force [2013] NSWADT 85

- Mr Lane’s licence was automatically revoked upon the making of an AVO against him
- Although the AVO was revoked, the Commissioner suspended his firearms licence on the basis that he was not a “fit and proper person” to hold such a licence
- In affirming this decision, the Tribunal gave weight to several offences committed by the Applicant, three of which involved minor cannabis possession
- While the Tribunal accepted that his cannabis habit had ceased, it did not appear to disregard the applicant’s past possession offences: [67].

“WAY OF LIVING OR DOMESTIC CIRCUMSTANCES”

Overview

Prior to making an adverse determination on the basis that the Commissioner has reasonable cause to believe that the applicant may not personally exercise continuous and responsible control over firearms because of “the applicant’s way of living or domestic circumstances”, you must first make a finding of fact regarding the particular domestic relationship (e.g. father/son, husband/wife, family member residing with the person) or aspect of their lifestyle which has the potential to pose a risk.

Even though the person may be a suitable person to have access to firearms, the circumstances of the people they live with or closely associate with may pose a risk, for example by intimidation or coercion.

Even a single episode of violent behaviour may be sufficient to warrant revocation in certain circumstances: see *Nasr v The Commissioner of Police* [2000] NSWADT 138 and *Carter v The Commissioner of Police* [2000] NSWADT 16.

In *Tolley v Commissioner of Police [2006]* NSWADT 149, the Tribunal said at [31]:

Given the breadth of the Commissioner's discretion and the overriding object of public safety there is no basis for differentiating between conduct of the Applicant themselves and conduct of another which may impact on public safety in the context of a firearms licence.

Leading case: *Raffoul v Commissioner of Police, NSW Police [2008]* NSWADT 6 - "reasonable cause"

- Mr Raffoul contested the Commissioner's refusal to grant him a firearms licence. The refusal was on the grounds that Mr Raffoul was and continued to be involved in a marriage marred by very numerous instances of domestic violence
- The Tribunal held that "*there is at present still no reasonable cause for the Commissioner to believe that, in a conflict situation, Mr Raffoul may not personally exercise continuous and responsible control over his firearms.*": [36]
- This "*reasonable cause*" to believe must involve more than mere suspicion or conjecture: *Austrac Operations Pty Ltd (in liq) v New South Wales [2003]* FCA 1013.

Factors to consider

When deliberating on the basis that the person could not exercise continuous and responsible control over firearms because of their way of living or domestic circumstances, the following factors can be taken into consideration when making your determination:

- **What is the nature of the relationship?** e.g. history of intimidation, coercion, aggression, violence, drug addiction etc
- **Is the relationship intact?** i.e. is the relationship ongoing or has something happened to sever or ease the problems arising from the relationship?
- **Do you have 'reasonable cause to believe'** that because of the licensee's way of living or domestic circumstances, that he/she may not personally exercise continuous and responsible control of firearms? What is the evidence you rely upon?

Case law

Domestic Violence

El-Ashrafi v Commissioner of Police, NSW Police Force [2017] NSWCATAD 103

- Mr El-Ashrafi's licence was revoked because of the extensive and violent history of feuding between the applicant and his family, as well as the existence of a firearms prohibition order against his brother
- Although not expressed in the exact terms of **section 11(4)(a)** of the Firearms Act, the Tribunal found that the violent familial circumstances of the Applicant hindered his capacity to exercise continuous and responsible control over his firearms: [44]-[48].

Other Circumstances – drug addiction and mental health

Smith v Commissioner of Police, NSW Police Force [2018] NSWCATAD 282

- The Tribunal had to determine whether the Applicant's mentally ill and drug addicted child constituted a domestic circumstance that would affect the Applicant's ability to exercise continuous and responsible control over his firearms
- The Tribunal held that Mr Smith was able to exercise the requisite degree of control, but imposed a condition on the licence that the applicant's weapons were stored at his brother's adjacent property: [95].

Housea v Commissioner of Police, NSW Police [2014] NSWCATAD 54

- Mrs Housea was refused a licence by the Commissioner on the basis that her husband, who had a history of schizophrenia and had been subject to an AVO in relation to the applicant, rendered her domestic circumstances too great a threat to her ability to exercise continuous and responsible control over her firearms: [2]

- The Tribunal found reasonable cause to believe that the Applicant’s possession of firearms would eventually result in her husband’s handling of those firearms. On these grounds, the Tribunal affirmed the Commissioner’s decision to refuse the application: [88]-[96].

“ATTEMPTED SUICIDE AND/OR CAUSE A SELF-INFLICTED INJURY”

Overview

Prior to relying on this ground to make an adverse decision, you must first be satisfied on the balance of probabilities that an actual attempt at suicide or self-inflicted injury has occurred. A threat of suicide or self-inflicted injury is not sufficient.

Leading case: *AML v Commissioner of Police, NSW Police Force* [2013] NSWADT 5

- The applicant’s firearms licence was revoked after he attempted suicide by overdosing on pills
- The Tribunal noted that not every suicide attempt will justify revocation. The pertinent questions are the likelihood of another attempt, and the likelihood of a firearm being used in that attempt: [22]
- No “reasonable cause” was found to believe he would reattempt suicide, much less so using a firearm: [23]-[24].

Factors to consider

When deliberating on the basis that the person could not exercise continuous and responsible control over firearms because of a previous attempt to commit suicide or cause a self-inflicted injury, the following factors can be taken into consideration when making your determination:

- As noted above, you must be satisfied that an actual attempt to commit suicide or cause a self-inflicted injury has occurred
- The length of time since the attempt – was the attempt recent vs years ago?
- Age and circumstances of the person
- Rehabilitation and medical evidence of current condition.

NOTE: If a decision is made to proceed with further action (e.g. suspension, refusal or revocation) based on a threat of suicide or self-inflicted injury, it is recommended that you refer to the Public Interest section of these guidelines.

In addition, in the case of a new application and a previous attempt at suicide or self-inflicted injury, if you have determined to not proceed with refusal due to the attempt occurring some years ago and there being no recorded incidents since this time, a request for a medical or psychiatric assessment must be requested (if not already provided).

Case law

Laing v Commissioner of Police, New South Wales Police Force [2017] NSWCATAD 315

- The Tribunal accepted the Commissioner’s argument that there was a reasonable cause for belief in the possibility that the applicant might attempt to commit suicide with a firearm
- As the genuineness of previous attempts at suicide was not conclusively discernible, the Tribunal held that a comprehensive medical report of the Applicant needed to be tendered before a final decision could be reached on the issue: [66]
- Such a report would need to “set out sufficient details and reasoning about the opinion expressed, to provide the criteria... applied to reach its conclusion or to outline the history taken and the understanding of the facts applied to the criteria in order to reach the opinion”: *Potts v Commissioner of Police, New South Wales Police Service* [2010] NSWADT 311 at [44].

“INTEMPERATE HABITS - UNSOUND MIND”

Overview

This ground should only be relied upon if there is sufficient medical evidence from a qualified medical practitioner. For example, evidence that the individual has been scheduled/admitted into a mental health facility or rehabilitation centre for treatment.

Factors to consider

When considering whether the person could not exercise continuous and responsible control over firearms because of the person's intemperate habits or being of unsound mind, the following factors can be taken into consideration when making your determination:

- Expert advice from a medical professional relative to the persons diagnosed condition
- Reports or information from family members, police etc
- Information recorded in WebCOPS - e.g. events.

The definition of "intemperate habits" in the Collins Dictionary relevantly includes "consuming alcoholic drinks habitually or to excess".

Case law

Intemperate Habits

Mackay v Commissioner of Police, NSW Police Force [2015] NSWCATAD 259

- The Commissioner refused Mr Mackay's application for a firearms licence partially on the grounds that there was reasonable cause to believe that he might not exercise continuous and responsible control over firearms because of his intemperate habit
- It was clear on the evidence that a significant and long-term problem with alcohol existed, thereby leading the Tribunal to affirm the Commissioner's decision.

Rodgers v Commissioner of Police, New South Wales Police Service [2001] NSWADT 167

- This matter involved the suspension and subsequent revocation of the applicant's firearm licence following the issuing of an AVO against him by his partner
- The Tribunal relied on the Macquarie dictionary of habit: "a disposition or tendency, constantly shown, to act in a certain way." On this issue, the Tribunal stated that "a single incident of drunkenness does not of itself establish disposition or tendency towards intemperate habits.": [24]
- The Tribunal held there was insufficient evidence to prove the presence of such a habit.

Unsound Mind

Sweet v Commissioner of Police, New South Wales Police Service [2000] NSWADT 185

- Mr Sweet's firearms licence was revoked following a verbal altercation between himself and a police officer. The charges were dropped on the basis that the applicant was suffering a flare up of PTSD
- The Tribunal noted that 'unsound mind' is a phrase that must be interpreted in the context of the Act's purpose; namely, to ensure firearm licencing does not interfere with public safety: [25]-[27]
- As fits of anger are a symptom of PTSD, such a disorder would cause a mind to be 'unsound': [27]
- Accepting the Commissioner's submissions, the Tribunal affirmed the revocation.

Cross v Commissioner of Police, New South Wales Police Force [2018] NSWCATAD 26

- In revoking Mr Cross's licence, the Respondent in this case relied, among other things, on Mr Cross's soundness of mind, claiming his mental illnesses gave reasonable cause to believe he would not exercise continuous and responsible control over their firearms
- The Tribunal noted that "a finding of unsoundness of mind will normally require recent expert evidence." The absence, in this case, of expert evidence led the Tribunal to set aside the revocation: [54].

Moroney v Commissioner of Police, New South Wales Police Force [2015] NSWCATAD 138

- After suffering a brain injury, Mr Moroney experienced post-traumatic amnesia, depression, anxiety and short-term memory difficulties. Upon learning of the applicant's condition, the Commissioner revoked his licence on the basis that he would not be able to exercise continuous and responsible control over his firearms

- The Tribunal noted the importance of medical, psychiatric and psychological evidence in deciding a case about mental health and the public interest: [50]
- The Commissioner's decision was affirmed on the basis that despite good progress made by the applicant since the accident, more time was needed before their receipt of a licence would pose "virtually no risk" to public safety: [51]-[52].

Morarescu v Commissioner of Police, NSW Police Force [2010] NSWADT 177

- Mr Morarescu's firearms licence was revoked after he was involved in a traffic accident as a pedestrian. Following the accident, his mental and physical health deteriorated, leading the Commissioner to develop concerns over his capacity for rational judgement
- The Tribunal set the revocation aside on the basis that the Respondent had not proven the mental injury suffered by the Applicant was permanent. Rather, the short-term memory loss and confusion was considered a temporary symptom of infections developed after the accident: [14]
- Consequently, there was no reasonable cause to believe that the Applicant was of unsound mind and unable to exercise continuous and responsible control of his firearms.

STORAGE AND SAFETY REQUIREMENTS ARE CAPABLE OF BEING MET

Under **section 11(3)(c)** of the Firearms Act, a licence must not be issued unless the Commissioner is satisfied that the storage and safety requirements set out in Part 4 are capable of being met by the applicant.

Failure to comply with safe storage may also factor into a consideration of the public interest test.

Rivero v Commissioner of Police, NSW Police Force [2019] NSWCATAD 39

- The Commissioner suspended Mr Rivero's licence following a break-in at his residence during which several firearms and some ammunition was stolen. Police determined that the cabinet in which they were stored did not meet safe storage guidelines
- Although police had approved the storage cabinet, prior to the robbery, they had not undertaken a subsequent inspection after the laundry in which the cabinet sat was renovated. These renovations caused the cabinet to become easier to access and consequently less secure
- The Tribunal placed significant weight on the fact that, immediately following the robbery, Mr Rivero undertook to bolster the security of the storage facilities in his residence. This demonstrated a clear willingness on his part to learn from his experience: [90]
- The Tribunal found that the decision to refuse to reinstate the licence was, at the time, the correct decision, but that Mr Rivero's actions since demonstrated that there was no real and appreciable risk that he would, generally speaking, disregard safe storage requirements in future: [99]-[101].

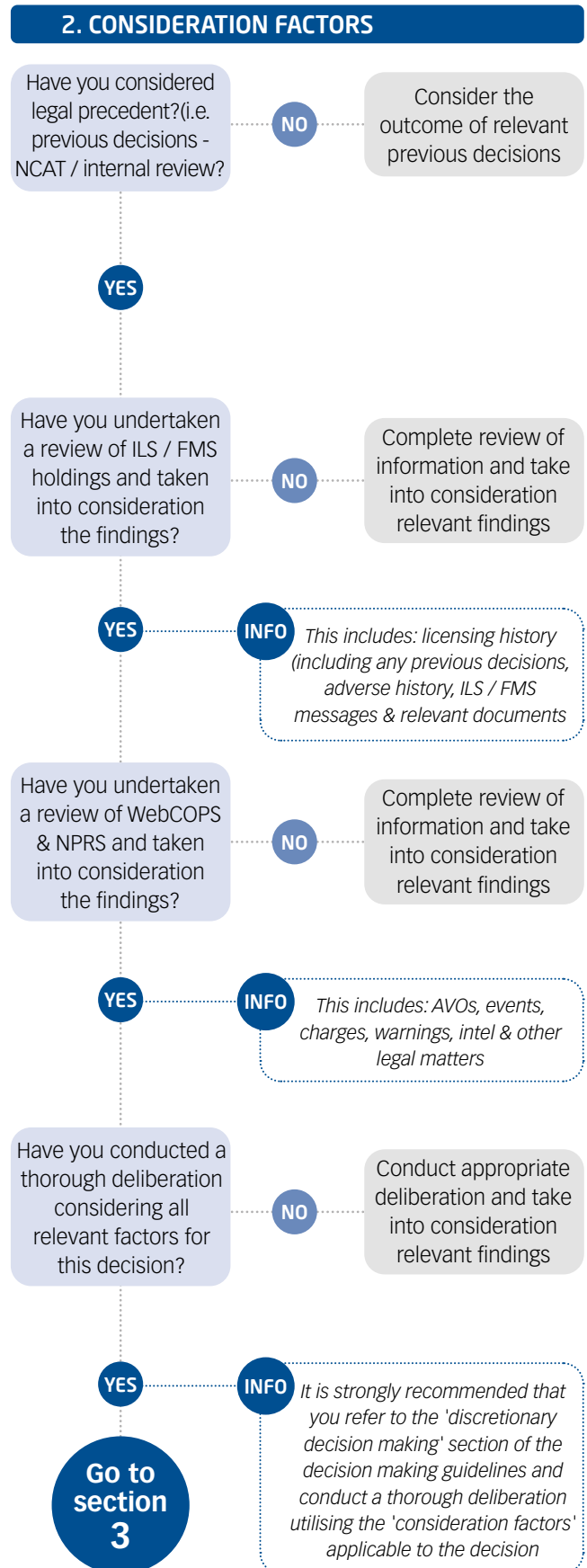
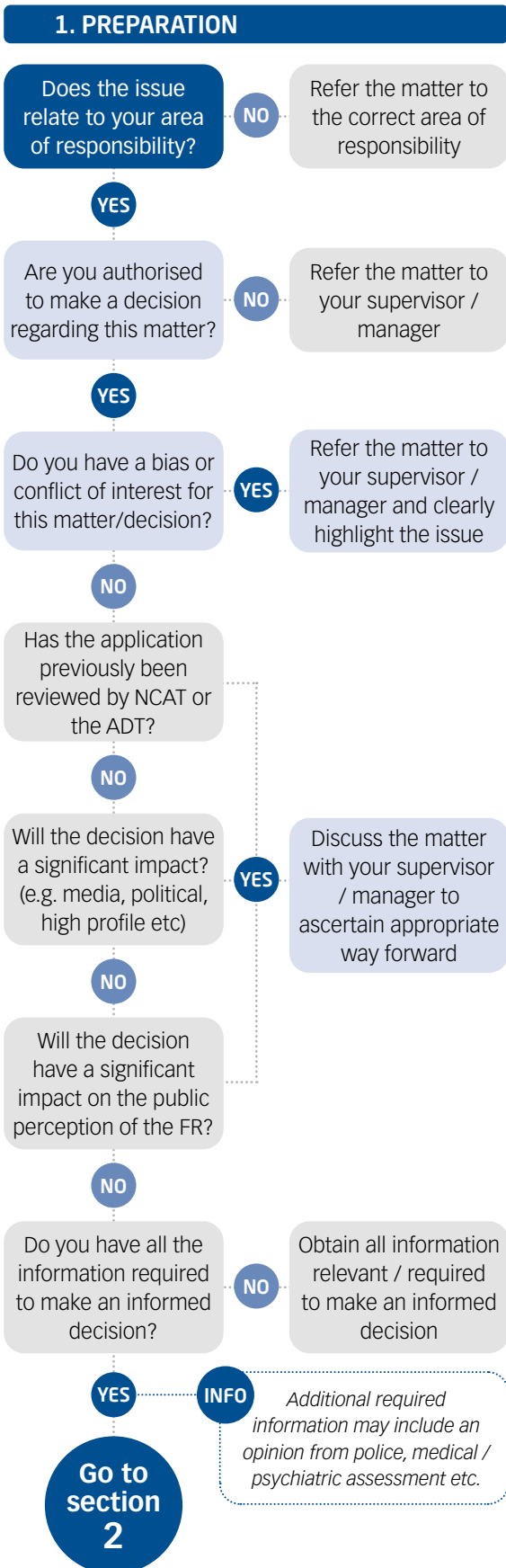
Buckley v Commissioner of Police, NSW Police Force [2018] NSWCATAD 280

- Mr Buckley's firearms licence was refused after it was discovered he had been charged with offences in QLD that related to, among other things, unsafe storage of firearms. The Commissioner submitted that he could not be trusted to comply with safe storage regulations; therefore, it was not in the public interest to grant him a licence.

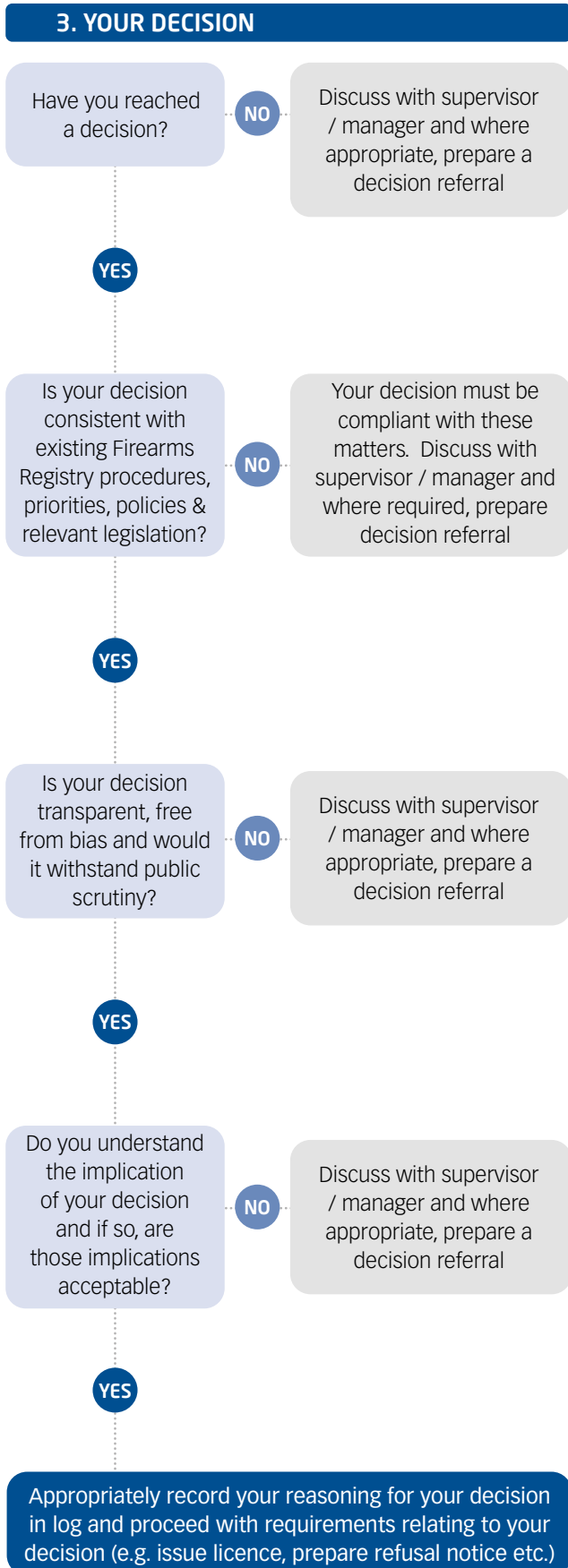
The Tribunal affirmed the Commissioner's decision, viewing his safe storage breaches as part of a general disregard for the seriousness of firearms regulations. Furthermore, his evidence relating to the incidents of unsafe storage was at times inconsistent, leading the Tribunal to question how effective his future compliance would be. The Tribunal held that it could not be confidently asserted that there was "virtually no risk" to the public in granting him a licence.

DECISION MAKING FLOWCHART

This flowchart should be utilised in conjunction with other relevant resources, including the decision making guidelines, legislation and legal precedent.



DECISION MAKING FLOWCHART



DISCRETIONARY DECISION-MAKING TABLE

SITUATION	LICENCE APPLICATION PENDING (REFUSE VS ISSUE)
<p>Licence applicant/holder is charged with a prescribed offence (court result pending)</p>	<p>The decision to await the court result vs refusing the application will be dependent upon an assessment of:</p> <ol style="list-style-type: none"> 1. Is the application a renewal (i.e. does the applicant have continuing authority)? 2. Objective seriousness of the offence: If the matter is withdrawn / dismissed at court, would you issue the licence? 3. Current/previous history: is the offence/s and previous history of the customer serious enough to warrant a refusal on discretionary grounds (i.e. public interest and/or fit and proper)? 4. Mitigating factors (e.g. a 20-year unblemished licensing history). <p>Refer to the 'discretionary decision making' section (including the applicable prescribed offence section) of these guidelines and utilise the relevant 'consideration factors' to conduct a thorough deliberation.</p> <p>It is likely the application would be refused on public interest grounds in the absence of exceptional circumstances given the existence of a prescribed offence with an undetermined court outcome and the fact that it is possible the applicant would require a mandatory refusal if a finding of guilt with the appropriate penalty threshold occurred.</p>
	<p style="text-align: center;">LICENCE ISSUED (SUSPENSION VS REVOCATION)</p> <p>The decision to suspend vs revoke (prior to the matter being heard at court) will be dependent upon an assessment of:</p> <ol style="list-style-type: none"> 1. Objective seriousness of the offence: if the matter is withdrawn / dismissed at court, would you reinstate the licence? 2. Current/previous history: is the offence/s and previous history of the customer serious enough to warrant a revocation on discretionary grounds (i.e. public interest and/or fit and proper)? 3. Mitigating factors (e.g. first time come to adverse notice). <p>Refer to the 'discretionary decision making' section (including the applicable prescribed offence section) of these guidelines and utilise the relevant 'consideration factors' to conduct a thorough deliberation.</p> <p>The decision to allow a licence to remain issued may occur in special or exceptional circumstances. Such decisions must be discussed/approved and/or referred to your supervisor/manager.</p>

DISCRETIONARY DECISION-MAKING TABLE

SITUATION	LICENCE APPLICATION PENDING (REFUSE VS ISSUE)
Licence applicant / holder is convicted and the prescribed penalty threshold reached	Mandatory refusal (no discretion exists) - Prepare refusal notice
	LICENCE ISSUED (SUSPENSION VS REVOCATION)
	<p>If a licence/permit holder is convicted of a prescribed offence and the prescribed penalty threshold required (as per clause 5 of the Regulation) has been reached, the licence/permit should be revoked on discretionary revocation provisions (unless there are special or exceptional circumstances). Upon renewal of the licence/permit, the application will require refusal on mandatory refusal provisions.</p> <p>It was highlighted in the Tribunal (<i>Maloney v Commissioner of Police (COP)</i>, NSW Police Force and more recently <i>Parisi v Commissioner of Police, NSW Police Force</i> [2018] NSWCATAD 155) that although discretion exists where a conviction occurs after the licence has been issued, only “in special or exceptional circumstances should the discretion not to revoke be exercised”.</p> <p>It is recommended that you refer to the relevant prescribed offence section of these guidelines and conduct a thorough deliberation using the consideration factors to ascertain if there are any “special circumstances”. For example, a licence that was issued in connection with the applicant’s ability to draw an income (primary producer) and the time remaining on the licence. These considerations must be balanced against the seriousness of the breach / misconduct.</p> <p>If the decision to not revoke is reached, such decisions must be discussed/ approved and/or referred to your supervisor/manager and appropriately documented in a decision log.</p>
SITUATION	LICENCE APPLICATION PENDING (REFUSE VS ISSUE)
Licence applicant/holder found guilty (no conviction, but subject to good behaviour bond (GBB), Conditional Release Order (CRO))	Mandatory refusal (no discretion exists) - Prepare refusal notice
	LICENCE ISSUED (SUSPENSION VS REVOCATION)
	<p>The decision to lift the suspension vs proceed to revocation will be dependent upon considering and weighing up many factors. Serious consideration must be given to the fact that the person is subject to a GBB for a prescribed offence, which would require a mandatory refusal for a new licence application.</p> <p>Similar findings to the aforementioned Tribunal decision were noted in <i>Edlington v Commissioner of Police, NSW Police Force</i> [2019] NSWCATAD 58 where the applicant received GBBs for prescribed offences (firearm and weapon related) which had not yet expired. The <i>Maloney v COP</i> case was referenced where a distinction between the two cases was outlined (conviction vs subject to GBB both require a mandatory refusal for a new licence application) and it was highlighted that the discretion to revoke on a ground that triggers a mandatory refusal should be exercised unless there are “special circumstances”. Again, this would depend on the seriousness of the breach/misconduct, the antecedents of the licensee, the length of time of the GBB/CRO compared to the time remaining on the licence and any mitigating circumstances. Hardship and/or inconvenience are unlikely to warrant “special circumstances”, including for example, a personal connection to a sport/hobby of clay target shooting which has an impact on a licensee’s social life.</p> <p>While considering the above information, it is recommended that you refer to the relevant prescribed offence section of these guidelines and conduct a thorough deliberation using the consideration factors to ascertain if there are any “special circumstances”.</p>

DISCRETIONARY DECISION-MAKING TABLE

SITUATION	LICENCE APPLICATION PENDING (REFUSE VS ISSUE)
Licence applicant/holder found guilty (no conviction or GBB or CRO)	<p>The decision to refuse vs issue the licence will be dependent upon considering and weighing up many factors that include a finding of guilt for a prescribed offence.</p> <p>It is recommended that you refer to the discretionary decision section (including the relevant prescribed offence section) of these guidelines and conduct a thorough deliberation utilising the consideration factors.</p>
	<th data-bbox="533 562 1439 624">LICENCE ISSUED (SUSPENSION VS REVOCATION)</th> <p data-bbox="533 624 1439 741">The decision to lift the suspension vs proceeding to revocation will be dependent upon considering and weighing up many factors that include a finding of guilt for a prescribed offence.</p> <p data-bbox="533 741 1439 862">It is recommended that you refer to the discretionary decision section (including the relevant prescribed offence section) of these guidelines and conduct a thorough deliberation utilising the consideration factors.</p>
SITUATION	LICENCE APPLICATION PENDING (REFUSE VS ISSUE)
The charge is dismissed / withdrawn (no finding of guilty)	<p>The decision to refuse vs issue the licence will be dependent upon considering and weighing up many factors that includes examining the offending behaviour behind the charge and advice on the reasons for the withdrawal and dismissal of the matter.</p> <p>It is recommended that you refer to the relevant prescribed offence section of these guidelines and conduct a thorough deliberation utilising the consideration factors. However, the court result must be given serious consideration during the deliberation process.</p>
	<th data-bbox="533 1245 1439 1308">LICENCE ISSUED (SUSPENSION VS REVOCATION)</th> <p data-bbox="533 1308 1439 1424">The decision to lift the suspension vs proceeding to revocation becomes somewhat difficult when the matter you were awaiting to be heard at court obtains a withdrawn/dismissed result (no finding of guilt).</p> <p data-bbox="533 1424 1439 1581">It is recommended that you refer to the relevant prescribed offence section of these guidelines and conduct a thorough deliberation utilising the consideration factors. However, the court result must be given serious consideration during the deliberation process.</p>

PRESCRIBED OFFENCES

MANDATORY DISQUALIFICATION

Section 11(5)(b) of the Firearms Act provides that a person must not be issued with a licence if the person has, within the period of 10 years before the application for the licence was made, been convicted in New South Wales or elsewhere of an offence prescribed by the regulations, whether or not the offence is an offence under New South Wales law. (See also **section 29(3)(b)** in relation to firearms permits).

Clause 5(1) of the Firearms Regulation prescribes the following offences for the purposes of **sections 11(5)(b)** and **29(3)(b)** of the Firearms Act:

(NOTE: all below prescribed offences include offences committed in any Australian or overseas jurisdiction)

- a. Offences relating to the possession or use of a **firearm** or any **other weapon**, or a **firearm part** or **ammunition**
- b. Offences in respect of a **prohibited plant or prohibited drug** within the meaning of the *Drug Misuse and Trafficking Act 1985* or a prescribed restricted substance within the meaning of the *Poisons and Therapeutic Goods Regulation 2008*, being an offence in respect of which the penalty imposed included any term of imprisonment (whether or not suspended), a community service order, a good behaviour bond or a penalty of \$2,200 or more
- c. Offences relating to **public order** or involving **assaults against law enforcement officers**, being:
 - i. an offence under [Division 8A](#) of Part 3 of the *Crimes Act 1900*
 - ii. an offence under [Division 1](#) of Part 3A of the *Crimes Act 1900*
 - iii. an offence of attempting to commit, threatening to commit or conspiring to commit an offence referred above
- d. Offences involving violence, being:
 - i. the **infliction of actual bodily harm** on a person in respect of which the penalty imposed included any term of imprisonment (whether or not suspended), a community service order, a good behaviour bond or a penalty of \$500 or more, or
 - ii. an offence involving **kidnapping** or **abduction**, or
 - iii. an offence involving **stalking** or **intimidation**, or
 - iv. an offence of attempting to commit, threatening to commit or conspiring to commit an offence referred above
- e. Offences of a **sexual nature**, being
 - i. an offence under [Division 10, 10A](#) or [10B](#) of Part 3 of the *Crimes Act 1900*, or
 - ii. an offence under **section 38, 38A, 111, 112** or **113** of the *Crimes Act 1900*, that has been committed with intent to commit an offence referred to above, or
 - iii. an offence under [Division 15](#) or [15A](#) of Part 3 of *Crimes Act 1900*, or
 - iv. an offence under **section 11G** of the *Summary Offences Act 1988*, or
 - v. any other offence that at the time it was committed, would have been an offence referred to above, or
 - vi. an offence of attempting to commit, threatening to commit or conspiring to commit an offence referred to above
- g. Offences involving **fraud, dishonesty** or **stealing**, being an offence in respect of which the penalty imposed included a term of imprisonment (whether or not suspended) for 3 months or more, a community service order for 100 hours or more or community service work, or a good behaviour bond
- h. Offences involving **robbery** (whether armed or otherwise)
 - ix. Offences relating to **riot**, being an offence under **section 93B** of the *Crimes Act 1900* or any similar offence
 - x. Offences relating to **affray**, being an offence under **section 93C** of the *Crimes Act 1900* or any similar offence

- k. Offences relating to **terrorism**, being an offence under Part 6B of the *Crimes Act 1900* or against Part 5.3 of the *Criminal Code* set out in the Schedule to the *Criminal Code Act 1995* of the Commonwealth
- l. Offences involving **organised criminal groups, consorting and recruitment**, being an offence committed under **section 93T, 93X or 351A** of the *Crimes Act 1900*.

CONVICTION NOT RECORDED, OR MATTER WITHDRAWN/DISMISSED

In instances where a person is charged with a prescribed offence, but a non-conviction court result is obtained (or the matter is withdrawn or dismissed), you cannot refuse or revoke the licence/permit on the grounds of being convicted of the prescribed offence.

However, you should still consider whether, on the civil standard of proof, the conduct for which the person was charged occurred. If you are satisfied that there is sufficient evidence that the conduct occurred, you should consider the factors below for each prescribed offence. The conduct may be relevant to other refusal/revocation grounds. In this case, you should also utilise the consideration factors for the other refusal/revocation grounds, such as the public interest or whether the person is a fit and proper person.

If a conviction is recorded, and a person already holds a licence, you should also consider whether the offence provides a ground to revoke the licence under **section 24(2)(a)** of the Firearms Act.

Regardless of whether a conviction is recorded, you may consider whether the person's conduct, if it can be proved on the balance of probabilities, means that the person is no longer a fit and proper person to hold a licence (**section 24(2)(c)** of the Firearms Act) or that it would not be in the public interest for the person to continue to hold the licence (**clause 20** of the Firearms Regulation).

Factors to consider

- **The type of offence** – Does the offence fall within the prescribed category?
 - E.g. a 'common assault' offence does not constitute as a prescribed offence
 - Check whether there is a requirement for a penalty to be imposed, and whether that requirement has been met
- **The circumstances surrounding the offence**
 - Was it a legitimate accident, not through any fault of their own vs blatant or premeditated behaviour?
- **Was/has the public's safety been placed at risk because of the actions?**
 - For example, were firearms stolen by the criminal element because of their failure to ensure safe keeping or firearm unsafely stored in presence of children?
- **Aggravating factors?**
 - Threat to use a firearm/weapon?
 - Intimidation?
- **Seriousness of the offence** – Minor breach or significant, for example:
 - Ammunition stored with firearm vs supply of unregistered firearm
 - Type or quantity of the drug
 - Minor assault vs assault causing significant injury
 - Pub brawl vs premeditated instigated assault on known person, such as spouse etc
 - Minor shoplifting type offence vs large scale premeditated theft or acts of dishonesty
 - Minor robbery offence that occurred a number of years ago vs armed robbery offence
 - Minor incident vs premeditated large scale riot and role played within incident
- **Circumstances surrounding the offence**
 - Eg supply of prohibited drugs vs small amount for personal use
 - Pub brawl vs premeditated instigated assault on police officer
 - Eg personal vs medical drug use
- **Is there a nexus between the offence/incident and doubts about their ability to responsibly possess and use firearms?**
- **The number of offences** – did the person commit one or multiple breaches?

- **Any previous breaches / offences** – is this the first firearm or weapon related breach or has the person come under adverse notice prior to this matter?
- **Previous criminal history** – the history of the person in its totality should be taken into consideration, including any interstate criminal history
- **Public opinion** – Would the public consider it reasonably appropriate and feel secure in the knowledge that the individual under notice has access to firearms?
- **Opinions held by local police** – Have local police expressed concerns?
- **Court outcome** – if a prior decision has been made to await the outcome of the court result before making a determination, the court result becomes very relevant in the decision-making process (conviction vs finding of guilt vs withdrawal / dismissal)
 - It is important to note the penalty threshold required for the offence to qualify as a prescribed offence (for example, conviction recorded AND any term of imprisonment (whether or not suspended), a community service order, a good behaviour bond or a penalty of \$2,200 or more)
- **Length of time licence held** – i.e. has the person held a licence for a significant period without coming to adverse notice?
- **The likelihood of further breaches being committed**
 - Based on the offence/s and circumstances surrounding the offence is it likely that further breaches or offences will be committed?
 - Does it appear that the person's misconduct is escalating?
- **Evidence of rehabilitation?**
- **Relevant personal details** – i.e. the age and domestic circumstances of the person
- **Genuine reason for applying/holding the licence** – does the person require firearms for employment purposes? (e.g. primary producer)

PRESCRIBED OFFENCES - REFUSAL / REVOCATION PROVISIONS

Prescribed offences - involving or relating to:	Convicted of prescribed offence - court result required within the past 10 years (from result date):	Currently subject to a good behaviour bond for a prescribed offence:
Firearms, other weapons, firearm part or ammunition	Refusal Ground: 1013 (Mandatory) Revocation Ground: 2013 (Discretionary) Conviction only required	Refusal Ground: 1060 (Mandatory) Revocation Ground: 2060 (Discretionary) Current good behaviour bond* required - regardless of whether conviction recorded
Prohibited plant, prohibited drug or prescribed restricted substance	Refusal Ground: 1011 (Mandatory) Revocation Ground: 2011 (Discretionary) Conviction in addition to any of the following sentencing options: - Any term of imprisonment (including suspended sentences)*, - Community service order*, - Good behaviour bond*, - Penalty/fine of \$2,200 or more	Refusal Ground: 1080 (Mandatory) Revocation Ground: 2080 (Discretionary) Current good behaviour bond* required - regardless of whether conviction recorded
Public order or assaults against law enforcement officers (includes an offence of attempting, threatening or conspiring to commit the above noted offence)	Refusal Ground: 1128 (Mandatory) Revocation Ground: 2111 (Discretionary) Conviction only required	Refusal Ground: 1129 (Mandatory) Revocation Ground: 2112 (Discretionary) Current good behaviour bond* required - regardless of whether conviction recorded
Violence - an offence involving the infliction of actual bodily harm For example: a 'common assault' offence is not a prescribed offence, however an 'assault occasioning actual bodily harm' is a prescribed offence)	Refusal Ground: 1012 (Mandatory) Revocation Ground: 2012 (Discretionary) Conviction in addition to any of the following sentencing options: - Any term of imprisonment (including suspended sentences)*, - Community service order*, - Good behaviour bond*, - Penalty/fine of \$500 or more	Refusal Ground: 1081 (Mandatory) Revocation Ground: 2081 (Discretionary) Current good behaviour bond* required - regardless of whether conviction recorded
Kidnapping or abduction (includes an offence of attempting, threatening or conspiring to commit the above noted offence)	Refusal Ground: 1012 (Mandatory) Revocation Ground: 2012 (Discretionary) Conviction only required	Refusal Ground: 1081 (Mandatory) Revocation Ground: 2081 (Discretionary) Current good behaviour bond* required - regardless of whether conviction recorded
Stalking or intimidation (includes an offence of attempting, threatening or conspiring to commit the above noted offence)	Refusal Ground: 1012 (Mandatory) Revocation Ground: 2012 (Discretionary) Conviction only required	Refusal Ground: 1081 (Mandatory) Revocation Ground: 2081 (Discretionary) Current good behaviour bond* required - regardless of whether conviction recorded

PRESCRIBED OFFENCES - REFUSAL / REVOCATION PROVISIONS

Prescribed offences - involving or relating to:	Convicted of prescribed offence - court result required within the past 10 years (from result date):	Currently subject to a good behaviour bond for a prescribed offence:
Sexual nature (includes an offence of attempting, threatening or conspiring to commit the above noted offence)	Refusal Ground: 1075 (Mandatory) Revocation Ground: 2075 (Discretionary) Conviction only required	Refusal Ground: 1069 (Mandatory) Revocation Ground: 2069 (Discretionary) Current good behaviour bond* required - regardless of whether conviction recorded
Fraud, dishonesty or stealing	Refusal Ground: 1076 (Mandatory) Revocation Ground: 2076 (Discretionary) Conviction in addition to any of the following sentencing options: - Term of imprisonment for 3 months or more (including suspended sentences)*, - Community service order for 100 hours or more*, - Good behaviour bond*	Refusal Ground: 1082 (Mandatory) Revocation Ground: 2082 (Discretionary) Current good behaviour bond* required - regardless of whether conviction recorded
Robbery	Refusal Ground: 1077 (Mandatory) Revocation Ground: 2077 (Discretionary) Conviction only required	Refusal Ground: 1071 (Mandatory) Revocation Ground: 2071 (Discretionary) Current good behaviour bond* required - regardless of whether conviction recorded
Riot	Refusal Ground: 1132 (Mandatory) Revocation Ground: 2115 (Discretionary) Conviction only required	Refusal Ground: 1133 (Mandatory) Revocation Ground: 2116 (Discretionary) Current good behaviour bond* required - regardless of whether conviction recorded
Affray	Refusal Ground: 1136 (Mandatory) Revocation Ground: 2119 (Discretionary) Conviction only required	Refusal Ground: 1137 (Mandatory) Revocation Ground: 2120 (Discretionary) Current good behaviour bond* required - regardless of whether conviction recorded
Terrorism	Refusal Ground: 1078 (Mandatory) Revocation Ground: 2078 (Discretionary) Conviction only required	Refusal Ground: 1074 (Mandatory) Revocation Ground: 2074 (Discretionary) Current good behaviour bond* required - regardless of whether conviction recorded
Organised criminal groups, consorting and recruitment	Refusal Ground: 1119 (Mandatory) Revocation Ground: 2107 (Discretionary) Conviction only required	Refusal Ground: 1079 (Mandatory) Revocation Ground: 2079 (Discretionary) Current good behaviour bond* required - regardless of whether conviction recorded

*New sentencing provisions commenced on 24/09/18 where several existing sentencing options were repealed and/or replaced. Accordingly, you must be familiar with both the repealed and new sentencing provisions. See below overview of the amendments:

- A Community Correction Order (CCO) replaced a **section 9** good behaviour bond and community service order (conviction will always be recorded)
- A Conditional Release Order (CRO) replaced a **section 10** good behaviour bond (court has the choice to record a conviction or to record a non-conviction)
- An Intensive Correction Order (ICO) replaced home detention orders, suspended sentences (**section 12**) and existing ICOs (conviction will always be recorded).

Refer to the Common Penalty Types Table below for further information regarding these penalty types and others.

NOTE: The refusal / revocation grounds referred to in the table above are refusal / revocation grounds for a firearm licence. The refusal / revocation grounds will differ for firearm and prohibited weapon permits. Refer to the Grounds available on the Firearms Registry Interface for applicable permit refusal / revocation grounds.

COMMON PENALTY TYPES TABLE

Penalty Type	Current / Repealed	Conviction Recorded?	Description / Comments
Imprisonment	Current	YES	This is the highest possible penalty
Home detention	Repealed on 24/09/18 but may be imposed as a condition of an Intensive Correction Order (ICO)	YES	Home detention is an alternate to full-time imprisonment. In effect, the sentence is served at the persons address rather than gaol. Home detention entails strict supervision and electronic monitoring
Intensive Corrections Order (ICO)	Current (replaced home detention and a suspended sentence)	YES	An ICO is a custodial sentence that the court decides can be served in the community. Supervision of the person is mandatory and additional conditions can be added such as home detention, community service work etc
Suspended Sentence (section 12 good behaviour bond)	Repealed on 24/09/18 and replaced with an ICO (see above)	YES	This option is a sentence of imprisonment that is suspended upon the person entering a good behaviour bond. Provided the terms of the good behaviour bond are obeyed the sentence of imprisonment will not come into effect.
Community Corrections Order (CCO)	Current (replaced a Community Service Order and section 9 Good Behaviour Bond)	YES	A CCO is a flexible sentence that the court can tailor to reflect the nature of the offender and the offence. Conditions can be added such as supervision, community service work and curfews etc
Community Service Order (CSO)	Repealed on 24/09/18 and replaced with a CCO (see above)	YES	A CSO involves either unpaid work in the community or to undertake a course, such as anger management.
Fine	Current	YES	The court can order the person pay a fine as part, or all of the penalty for a sentence. Fines can be combined with other penalties.
Section 9 Good Behaviour Bond	Repealed on 24/09/18 and replaced with a CCO	YES	The court can order that the person be of good behaviour for a specified period. Additional conditions may be imposed.
Section 10A – Conviction	Current	YES	This option is a conviction with no further penalty attached.
Conditional Release Order (CRO)	Current (replaced a section 10 good behaviour bond)	OPTIONAL	A CRO allows the court the deal with first time and less serious offences where the offender is unlikely to present a risk to the community. Conditions can be imposed, such as drug and alcohol abstention, programs, non-association requirements etc. The court can record a conviction or choose to record no conviction.
Section 10 Good Behaviour Bond	Repealed on 24/09/18 and replaced with a CRO	NO	This order requires the person to be of good behaviour for a specified period. The person is found guilty of the offence, with no conviction recorded. Additional conditions may be imposed.
Section 10 Dismissal	Current	NO	This order allows the court to find the person guilty, however not record a conviction.
Withdrawn / Dismissed	Current	NO	No finding of guilt or conviction recorded.

- Other relevant information available / provided – all relevant information on file should be considered, this may include recommendation provided by police, correspondence from person or legal representative.

DECISION REFERRAL

WHAT IS A DECISION REFERRAL AND WHEN SHOULD IT BE USED?

Prior to preparing a decision referral document you should consider all alternatives. For example, it may be the case that any concerns you have with issuing/reinstating a licence/permit may be alleviated by the imposition of a condition or by consulting and discussing your indecision with a senior adjudicator.

You should only refer a matter to your supervisor/manager if:

- After making a full and complete consideration of the matter you believe the expertise of a more senior person is required because the matter for consideration is complex and/or borderline in nature
- The matter has significant work process, policy, legal, media or political implications which extend beyond your area of responsibility
- The matter has previously been subject to an external review by NCAT
- The matter requires corporate policy and/or legislative amendment
- The matter significantly impacts on public perception of the Firearms Registry and/or the NSW Police Force
- Your supervisor/manager has specifically requested that such matters be forwarded for information/referral
- To give the supervisor/manager sufficient information in the likelihood that the matter will be referred to a more senior person or outside agency for resolution.

The reasons for referring a matter to your supervisor/manager must be fully documented using the decision referral document (*available in FMS – letter template*).

DECISION REFERRAL DOCUMENT

This document must be used for all decisions referred to your supervisor/manager. The following provides information on how to accurately complete the decision referral document in the correct manner to facilitate efficiency, clarity and uniformity in work process.

“Background”: In this section you will need to provide the following information:

- Antecedents record
- Previous licensing history (limited to type of previous licence/permit and duration held)
- Category and genuine reason/s of current licence/permit held or applying for (if applicable)
- Licence/permit issue and expiry dates (if applicable)
- Recent licensing history (i.e. date of suspension/CNI hit etc)
- Circumstances that lead to this matter coming to notice, including any information received from internal/external sources (provide relevant documents as attachments)
- List all relevant events/charges/intel etc (provide relevant printouts as attachments).

The Background section should be fully utilised and should provide the information needed for the supervisor/manager to thoroughly and completely consider the matter to make a determination.

“Reasons for issue of licence/permit” and **“Reasons against issue of licence/permit”**: This section is broken into the two separate sections. The information provided must be brief and succinct and will need to outline the information you consider would support either the issue/reinstatement or refusal/revocation of the licence/permit.

The following reasoning process can be followed and included:

- Mitigating and/or aggravating circumstances of the incident
- Type of offence and how recent it is
- Previous licensing and criminal history
- Genuine reason for holding the licence

- Relevant personal details (i.e. age, domestic circumstances etc)
- Your consideration of recommendations received (internal/external), i.e. police officers, medical professionals, community groups etc
- Applicable legislative provisions.

“Recommendation”: In this section you will need to be brief and succinct and you must supply the following information:

- Your considered opinion on the determination to be made
- The legislative basis for your recommendation.

INAPPROPRIATE DECISION REFERRALS

When your supervisor/manager receives your decision referral, the following will be considered:

- Is the decision on this referral being made at the appropriate level, closest to the issue? i.e. should this decision have been made by the referring officer and not referred to the supervisor/manager
- Has the referring officer made a full and complete consideration of the matter?
- Has the referring officer provided all relevant background material and information from other sources (e.g. WebCOPS/ILS printouts, police reports, medical assessments etc) and submitted using the decision referral document?
- Has the referring officer stated in their own opinion how the matter should proceed for consideration?

If all the above criteria are not met, then the decision referral will be returned to you to address.

GLOSSARY OF TERMS

1. **Adjudication** – to make a formal decision.
2. **Aggravating circumstances** – factors that increase the severity or culpability of the criminal act.
3. **Antecedents** – the history of the person.
4. **Decision Log** – a detailed document outlining a decision and information and factors considered to reach the decision made.
5. **Deliberation** – long and careful consideration or discussion.
6. **Ground** – legislative basis for a decision.
7. **Legal Precedent** – a legal case that establishes a principle or rule. This principle or rule is then used to decide later cases with similar issues or facts. The use of precedent provides predictability, stability, fairness and efficiency in the law.
8. **Mitigating circumstances** (aka: extenuating circumstances) – information or evidence regarding the person or the circumstances of the matter that might cause you to judge the matter in a less serious manner.
9. **Nexus** – a connection or link.
10. **Propensity** – an inclination or natural tendency to behave in a particular way.
11. **Statement of Reasons** – an explanation to the applicant or third party of how the decision was made.



NSW Police Force