

# Review

## Licensing without hiccups



## Headlines

### “MINISTER FOR LICENSING” AND NEW CULTURE SECRETARY APPOINTED

John Penrose, recently appointed as Minister for Tourism and Heritage, has taken on responsibility for alcohol and entertainment licensing. Mr Penrose is now a Minister for the Department for Culture, Media and Sport under the Secretary of State for the Department, Jeremy Hunt. However, it seems that the Home Office will also have a big influence on licensing under the new Government following the comments of the new Home Secretary, Teresa May, to the Police Federation Conference.

### GOVERNMENT ANNOUNCE PROPOSALS FOR LICENSING REGIME

The new Coalition Government has announced that it will undertake a review of the Licensing Act 2003. Please see the full report on page 3 below.

### WORLD CUP FEVER

The World Cup is just around the corner. Are all areas and times that you want to sell alcohol covered under your permanent Licence? If not, act now to ensure Temporary Event Notices are submitted in time for at least the later stages of the Cup (Temporary Event Notices require a minimum of ten clear working days notice). If you are ordering TVs to show the game, remember that you should have PRS and PPL Licences (the organisations that collect copyright for the playing of music).

### CRIME AND SECURITY ACT 2010 RECEIVES ROYAL ASSENT

The Crime and Security Act 2010 has received Royal Assent and will come into force as appointed by the Secretary of State. No dates have yet been announced, but we will provide further updates in our forthcoming Reviews. The Act amends the Licensing Act 2003 to insert sections 172A – 172E, giving licensing authorities the power to make ‘early morning’ alcohol restriction orders, and sets out the procedures to be followed in making such an order, as well as providing for variation and revocation of orders and exceptions.

A proposed further amendment to the Act post-Royal Assent gives local authorities powers to apply a blanket ban on premises opening for the sale of alcohol between 3am and 6am by specifying streets or areas, rather than premises, where it is considered necessary to promote the licensing objectives. These proposals perhaps have marked similarities to Alcohol Disorder Zones and we wait to see whether this legislation will be any more successful in practice.

### COSTS ORDERED AGAINST SUCCESSFUL LICENSING APPELLANTS

A strong message has been sent out to those appellants who have acted carelessly during proceedings. The High Court has confirmed that Magistrates in licensing appeals have a wide discretion as to costs and, in appropriate circumstances, can even make an award against a successful party to an appeal.

In the case of *Prasannan v Royal Borough of Kensington and Chelsea* [2010] EWHC 319 (Admin), the judge stated that the appellant had brought the revocation of her licence entirely upon herself, and during her appeal case, she had breached case management directions, her bundles of documents were late and there were substantial weaknesses in her evidence. Costs awarded against her totalled around £23,000.

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## INSPECTIONS CONTINUE APACE

The likelihood of routine enforcement inspections is growing, especially with parts of the new Mandatory Code now being in force, the remainder coming into force in October 2010. Please see page 3 below for tips on how to prepare for routine inspections.

## WELSH GOVERNMENT TO FOLLOW ENGLISH EXAMPLE BY BANNING CIGARETTE VENDING MACHINES IN PUBS BY 2011

Cigarette vending machines are due to be banned in Welsh pubs in October 2011 in line with England (the Health Bill 2009 proposed that the ban in England be brought into force on 1 October 2011). The Scottish Government is also considering a ban North of the border. Imperial Tobacco has applied for a judicial review of the ban in England, and is awaiting the outcome of this application.

## PUBS MAY FACE ACTION ON 'LOUD' LIVE MUSIC

Pubs could need a licence in the future to host performances of 'loud' unamplified music such as bagpipes, drums or brass instruments. The local council regulator, LACORS, has indicated that there is a lack of clarity as to what "incidental" music (which doesn't need to be licensed) entails and that negative definitions should be included in Guidance. Further comments on this are expected now the new Government is in place.

## OPERATORS MAY BE IN LINE FOR VAT REFUNDS ON AWP MACHINES

The Morning Advertiser have reported that, following Rank Group plc's successful ruling against HMRC last year, pub operators may be in line for windfall VAT refunds on Fruit/Amusement with Prizes machines (AWP). JD Wetherspoon became the first pub operator to benefit from the case, receiving a refund of £14.9 million from HMRC for overpayments of VAT on AWP machines.

It is estimated that there are about 1,000 claims from pubs outstanding for the period between 2002 and 2005, worth approximately £500 million. This ruling is currently subject to an appeal by HMRC to Europe but is not likely to be heard until 2012. We will continue to follow the progress of this case and include an update when anything further is reported.

## CRC ENERGY EFFICIENCY SCHEME – DEADLINE FOR REGISTRATION APPROACHING

Those businesses that fall under the CRC Energy Efficiency Scheme as full participants are reminded that they must register online via the Environment Agency's website by 30 September 2010. You can assess whether you are classed as a full participant using the EA's Guidance on their website (<http://www.environment-agency.gov.uk/business/topics/pollution/117652.aspx>).

The scheme is mandatory and failure to register will result in a fixed fine of £5,000, and a further £500 for each working day until registration, for a maximum of 80 working days. The EA will also publish any names of businesses who do not comply with the scheme in its press articles.

## CUMULATIVE IMPACT ZONE OFF-LICENCE APPEAL DISMISSED IN BRIGHTON

An appeal against a refusal by Brighton and Hove City Council to grant an Off-licence application in a Cumulative Impact Area has been dismissed. The Magistrates' and the Licensing Authority acknowledged that the Appellants were responsible and professional operators, but were not convinced that further conditions would minimise the impact of another Off-Licence in this particular area.

This demonstrates that Authorities are seriously contemplating the impact of further licensed premises in Cumulative Impact Areas, and that licences will be refused if there is enough evidence that further problems could occur.



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# Coalition government announces changes to the Licensing Regime

The new Coalition Government has published its programme for government. Included within that programme are several measures specifically aimed at the licensed trade. The proposals are:

- Banning the sale of alcohol below cost price.

- Reviewing alcohol tax and pricing to ensure it tackles binge drinking without unfairly penalising responsible drinkers, pubs and important local industries.
- Overhauling the Licensing Act to give local authorities and police stronger powers to remove licences from, or refuse to grant licences to, any premises that are causing problems.
- Allowing Councils and police to shut down permanently any shop or bar found to be persistently selling alcohol to children.
- Doubling the maximum fine for under-age alcohol sales to £20,000.
- Permission for local Councils to charge more for late-night licences to pay for additional policing.
- Cutting red tape to encourage the performance of more live music.

There is no timetable for implementation of these measures and it is perhaps unlikely to happen until after the 'urgent' action on the economy that is reportedly required.

On 25 May 2010 shortly after the Coalition Government's proposals were announced, the Queen revealed in her Speech that a Bill, entitled the Police Reform and Social Responsibility Bill, will be introduced. This Bill intends to make the police service more accountable to local people and to tackle alcohol-related violence and anti-social behaviour. It will incorporate all of the Coalition Government's proposals as set out above and create a dedicated Border Police Force.

It is clear that the new Government do have licensing squarely on the Agenda, particularly when the programme is viewed in the light of comments from the new Home Secretary, Theresa May, to the Police Federation Conference. Ms May told the Conference that she will be reviewing the licensing system and indeed had always been opposed to the changes to the Regime the previous government introduced, leading many 'red-top' newspapers to claim there will be a "Ban on 24 Hour Boozing".

The Government also plans to introduce new powers to give communities an opportunity to buy the "last pub in the village" under the proposed Localism Bill. The policies also aim to give communities a greater input on planning applications and allow local residents to appeal decisions made.

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## An Inspector Calls – How to Prepare for a Licensing Inspection

Although it is quite unusual for Licensing Officers to give you advance notice of a Licensing inspection, we have recently had clients presented with this situation and consequently, we have produced some tips for dealing with these inspections.

An inspection may cover numerous things and they can be a little difficult to prepare for, but there are some standard arrangements a licensee can make:

- If you have advance notice of an inspection, spend a little time researching your Inspector. Find out how experienced they are and whether they have a good understanding of licensed businesses and premises.
- Know what the inspector will check. This sounds obvious but there are numerous things they will be looking for. It is likely that they will check that you have everything on site that you should have and are displaying everything you should be. In all probability, they will bring the approved plans with them and check that they accord with the layout of the premises and will check that you/your staff are aware of the hours and conditions attached to the Licence. You should ensure that you, your managers and your staff know where your Licence, authorisations, incident logs, refusals books, training records and risk assessments are ready for inspection. Please also ensure that all fire escape routes are free of obstructions at all times.
- Ensure refusals books and incident logs are properly completed and reviewed by duty managers from time to time and that staff are aware of the importance of completing such logs. You should also ensure that if you operate a Challenge 21 or 25 Policy, appropriate signage is displayed and staff are trained to understand what the Policy means and how to apply it.

- Familiarise yourself with the hours and conditions on your Licence itself. You should read the full document, and establish what your Licence authorises, whether it be the sale of alcohol on and off the premises, hot food and hot drink, or regulated entertainment. You should also establish if your Licence has any restrictions, for example, music, dance or films being restricted to certain rooms.
- Check that all necessary documents are retained/displayed. Essentially, the certified copy Summary needs to be displayed near the main entrance to the Premises, together with the 'Duty to Display' document. There is now no requirement to display a separate 'plaque' over the main door (this was a requirement of the old regime that disappeared in 2005, although it seems to be a common misconception that this is still required). The certified copy of the full Premises Licence and approved plans need to be retained in a safe place, together with the Personal Authorisation (although these do not need to be displayed). All members of staff should be aware of the location.
- Make your staff aware of what questions may be asked by the Licensing Officer. Any enforcement officer may ask any member of staff:
  - Who is authorising the sale of alcohol (i.e. who is the Designated Premises Supervisor and the other personal licence holders?)
  - Where is the Licence Summary and Duty to Display?
  - Where is the full copy Premises Licence and can they inspect it?
  - Where is the authorisation for non-personal licence holders to serve alcohol?
- Ensure you have adequate numbers of personal licence holders to provide proper cover for your Premises. The Licensing Act specifies that all supplies of alcohol must be authorised by a personal licence holder.



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## Continued Confusion over the Mandatory Conditions

Confusion continues over interpretation of the new Mandatory Licensing Conditions as some local councils begin to crackdown on "irresponsible" drinks promotions at licensed premises.

As reported in our July 2009 Review, Mandatory Conditions 1 to 3 came into force on 6 April 2010, with Mandatory Conditions 4 and 5 coming into force on 1 October 2010. As a recap, these include:

- Condition 1 – No Irresponsible Promotions;
- Condition 2 – No Alcohol Dispensed Directly into the Mouth;
- Condition 3 – Free Tap Water for Customers;
- Condition 4 –Age Verification Policy; and
- Condition 5 – Availability of Small Measures.

However, a lack of clarity in the Home Office's Guidance has already meant uncertainty and inconsistency across the country.

It is reported that most difficulty has arisen with Condition 1 - No Irresponsible Promotions. In the guidance, the banned promotions included are those such as "all you can drink for £10", speed drinking competitions, any promotions that encourage the consumption of large quantities of alcohol and those that offer rewards for ordering a certain quantity of drinks.

Although some Councils' licensing teams have been clear about which promotions you can and cannot keep, many have failed to offer clear guidance to Operators.

So where has confusion arisen? One drinks promotion that certainly has ended is the controversial all-inclusive deal. However, some local operators have replaced these all-inclusive deals with promotions offering a set number of free drinks with the entry fee, including soft drinks, and the free drinks can be carried over to another evening.

Such deals have caused problems under the new restrictions as the Guidance specifically bans “large quantities of alcohol for free or at a fixed or discounted price”. It clearly states that deals such as “all you can drink for £10” and “£10 for 10 pints” are banned. Some authorities have already acted against these types of promotions, and have ruled that events offering a fixed price for a “high” number of drinks would breach the code, because they are substantially similar to all-inclusive deals.

Other licensed premises have attempted to avoid a breach of the “irresponsible promotions” condition by slashing prices rather than risk running specific promotions after 6 April 2010. However, this will not prevent scrutiny by Councils and police of venues offering cut-price alcohol. It is reported that in one area Councils have chosen to adopt “Gentleman’s Agreements” committing licensees not to sell alcohol at less than a minimum price.

It is not only the ban on ‘irresponsible promotions’ that are causing confusion amongst the trade. Although there is a ban on operators dispensing alcohol directly into a customer’s mouth, this seemingly does not of course prevent customers ‘helping themselves’ and their friends.

Free tap water for customers seems uncontroversial, but what about venues that hold meetings and generally charge for the provision of water at such events? It would seem that this is acceptable if the charge is for the set up of the room and the provision of glasses and jugs rather than the water itself.

In relation to Age Verification Policies the condition simply requires that a Policy is in place. It does not require the operator to verify the age of each and every customer. Indeed, those who already operate schemes such as Challenge 21, do not need to do anything else.

Finally, the condition regarding the availability of small measures is proving to be difficult to interpret and costly to implement. The Conditions simply state that customers must be made aware of the availability of these measures; they do not explain how an operator should do this and what will be considered sufficient or otherwise. The Guidance clarifies this to some extent, by giving the examples of listing them on drinks menus or being informed by staff when ordering drinks. However, this list is clearly neither inclusive nor exclusive and does not deal with situations where alcohol may be served by way of hospitality, for example at wedding receptions or business events.

It is clear that the Guidance still leaves lots of scope for interpretation and a variety of approaches have been adopted by councils and police in different parts of the country. The Home Office have specified in the Guidance that if there is any doubt as to whether the promotion a licensee is planning may fall foul of the Mandatory Conditions, the licensee should discuss their proposal with their local authority or police before running the promotion.

Time and case-law may well clarify the position in due course.

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## FURTHER INFORMATION

For advice or assistance on any of the above articles, please contact Stephanie Perraton or Nicola Smith who will be happy to assist.

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One way some licensed premises have avoided a breach of the “irresponsible promotions” conditions is to slash prices rather than risk running specific promotions after 6 April 2010.

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