

LEISURE UPDATE

The potential effects of the proposed Policing & Crime Bill

Hidden away in the Policing and Crime Bill are a number of potentially worrying licensing changes. Principal among these are possible new powers for both the Secretary of State and Local Authorities to set general conditions for premises licences.

Part 3 of the Bill covers a number of matters, including the increased penalties for consuming alcohol in Designated Public Places. These are increased from £500 to £2,500. There is also an issue of “persistently” selling alcohol to young persons. Section 27 of the new Bill will bring into effect, from a specific date, the so-called “Three Strikes” rule in relation to under-age alcohol sales which could result in the revocation of a Premises Licence.

Perhaps the most fundamental section is section 31 and its attendant and linked schedule 4 which potentially adds a new section 19A to the Licensing Act. This could allow the Secretary of State to add to the Act, by statutory instrument, conditions which would be applicable to all premises or to premises of a particular description.

There is an issue that these new conditions may be treated as “over-riding” any conditions already included in those Licences. The new powers would also give the Secretary of State scope to make provisions concerning the classification of premises.

Additionally, section 21A will allow Licensing Authorities to introduce conditions on Licences. Under the existing legislation, they cannot, of their own volition, change conditions but they can, in future, impose conditions from a list supplied by the Department of Culture, Media and Sport (DCMS). These conditions, however, must relate purely to the supply of alcohol, and not to the provision of entertainment or late-night refreshment.

These new-style conditions may be imposed generally on all premises in a locality, even if particular premises

do not necessarily need such conditions. There are requirements for the Authority to be satisfied that such conditions should be imposed which are identical to the Violent Crime Reduction Act 2006 in relation to Alcohol Disorder Zones. One may say that this is a further attempt to impose similar types of restrictions.

Among the mandatory conditions proposed are:

- An end to promotions aimed at encouraging people to drink more than they would otherwise do
- A prohibition on supply of alcohol direct into a person's mouth
- Display of unit contents of alcohol
- Specifying the availability of minimum standard measures of alcohol
- Free tap water
- Proof of Age requirement below 21
- Warning of under-age prohibition at the entrance to all licensed premises.

None of this is, as yet, finalised, so to all of you who hold Personal Licences or Premises Licences, you should lobby your MP immediately!

Nigel Lyons, partner can be contacted on 01752 675057 or email nigel.lyons@footanstey.com for advice.

Are you up to date with environmental legislation?

Keeping up to date with environmental legislation is crucial so as to avoid fines and potential prosecution.

The Environmental Damage (Prevention and Remediation) Regulations 2009 came into force on 1 March this year. Leisure businesses, including pubs, hotels and restaurants, are to be responsible for and to report environmental damage to land, water, protected species, habitats and Sites of Special Scientific Interest (SSSI) caused by their activities. The cost of remedying the damage will fall to businesses invoking the “polluter pays” principle so that those responsible for the damage pay to prevent and remedy it rather than being an additional burden to the taxpayer.

The regulations aim to implement pollution prevention measures minimising the risk of damage occurring rather than a reactive approach dealing with remedying the damage after the event. Businesses should adopt a risk assessment approach in identifying where their operations may cause threat or damage and then take action.

Businesses will be required to put forward remedial measures once damage has occurred. Remedial works may even extend beyond the contaminated site itself requiring the clean up of another site along with the payment of ‘compensatory’ remediation. This cost aims to compensate for interim losses resulting from the time the damage occurred until the remediation is completed. The latter does not include any financial compensation.

There are certain exemptions including damage prior to 1 March and acts of terrorism but they are fairly limited.

Failure to comply with a remediation notice or a notice to take measures to prevent environmental damage is an offence punishable:

- in the Magistrates’ Court with a fine currently not exceeding £5000 and/or imprisonment for a period not exceeding 3 months
- in the Crown Court with an unlimited fine and/or imprisonment for a period not exceeding 2 years.

Another set of environmental regulations coming into force on 1 October this year will have an effect on those businesses that produce waste. Until now businesses such as hotels and restaurants did not need to register if they transported their own waste. The Waste Controls (England and Wales) Regulations 2009 will require such businesses to register with the Environment Agency. Guidance is awaited from the Department for Environment and Rural Affairs on the regulations.

Rebecca Haynes is a solicitor in the property and construction team. Rebecca can be contacted on 01392 685279 or email rebecca.haynes@footanstey.com

Licensing in the credit crunch

It is currently estimated that about six pubs a week are closing. One of the principal reasons in such difficult economic times is either the personal bankruptcy of the owner or the company going into administrative receivership or liquidation.

One much forgotten fact of licensing law is the impact of section 27 of the Licensing Act 2003. This section states that a Premises Licence will lapse immediately on the death, mental incapacity or insolvency of the Premises Licence holder.

An act of insolvency can happen when:-

- an individual or company enters into a voluntary arrangement with creditors
- an individual is declared bankrupt, enters into a deed of arrangement or deed of trust for the benefit of creditors
- an administrator or administrative receiver is appointed in respect of a company
- a company goes into liquidation.

If any of these events take place, then it is vital that either banks or other parties interested in the business take steps to preserve the Premises Licence. The first step would be to apply for an immediate transfer of the Licence. The other would be to apply for what is called an ‘interim authority’.

Section 47 of the Licensing Act 2003 enables a licence to be preserved for an initial period of two months. This, at least, enables time to be spent in resolving licensing issues without the immediate threat of closure and for a formal transfer application to be made.

Failure to take such an action means that a Premises Licence will lapse and activities to sell alcohol from pubs and other outlets will have to cease.

The only way to reinstate a Premises Licence is to make a full scale application. There is obviously a cost issue in doing this and time delays whilst an application is considered but, more importantly, there will be opportunities for local residents and others to object to either the basis of the licence or its hours of operation.

For further information on how to protect your Premises Licence, Keith Biggs, partner can be contacted on 01392 685293 or email keith.biggs@footanstey.com

Reform of minor variations

Pressure from licensing lobbyist groups has led to the Secretary of State for Culture, Media and Sport proposing changes to the variation application process.

One of the short comings of the Licensing Act 2003 related to minor variations that needed to be made to premises licences. The problem with the original legislation, from a licensee's point of view, was that a minor variation could potentially lead to a full scale review of the licence following representations from local residents and businesses. An application could therefore be time consuming and expensive which has resulted in a significant number of minor variations taking place without changes being notified to the licensing authority.

As a result of the proposed changes to the applications process, a draft Order (the Legislative Reform (Minor Variations to Premises Licences and Club Premises Certificates) Order 2009) has just passed through the consultation process and details of responses will shortly be published by the Government.

The draft Order seeks to introduce a quicker and cheaper procedure for obtaining applications for minor variations. An obvious example would be the relocation of a bar or variation of features shown on a Premises Licence plan.

A minor variation though, would not include an application to substantially vary the premises or add to or vary the sale of alcohol as an authorised activity.

It is proposed that the licensing authorities be given a deal of discretion as to what is actually a minor and a major variation.

The draft Order proposes that a licensing authority must determine an application within 15 days of receipt. However, there is some uncertainty as to whether authorities have a further 15 days after this to consider applications if they accept an application as valid. As ever, the details will come out in the final drafting.

Hopefully, some common sense will prevail in this process and some clarity will come forward on how this Order is to be interpreted.

For further information Keith Biggs, partner can be contacted on 01392 685293 or email keith.biggs@footanstey.com

Food hygiene and food safety – don't "duck it"!

Food hygiene and food safety are currently receiving a lot of publicity, particularly at celebrity chef restaurants. Some people say that all publicity is good publicity, but where food hygiene problems cause your premises or restaurant to close, then I am sure that not everyone would agree.

At a time when you need to ensure that your food sales are as profitable as possible, should you ever receive a complaint from a disgruntled customer you are well advised to take such criticism seriously.

If you fail to placate a complaining customer, or if a number of your customers are struck down with food poisoning, it could seriously damage your reputation. This could be "repeat business" for all the wrong reasons.

Should a number of customers be affected, the case could be investigated under the Food Safety Act 1990 and the regulations attached to it. These make it an offence for anyone to sell food, or process food for sale, which is harmful to health. If there are a number of complaints from members of the public, then the complaints will be investigated by the Local Authority's food law enforcement officers who work very closely with the Food Standards Agency.

The legislation gives Local Government officers wide powers to inspect food premises. Although premises receive physical inspections once every six months to two years, enforcement officers have the power to take samples of food for testing to

ensure compliance with the food legislation at any time.

Enforcement officers also have the power to take action against premises that do not comply with the food legislation. At the lower end of the scale, they can issue warnings and improvement or prohibition notices. Ultimately, this can result in criminal penalties for non-compliance including, finally, the closure of the businesses where conditions are particularly serious.

We specialise in food safety advice, particularly where there is any formal inspection by the Local Authority which leads to the consideration of prosecution. Where there is any investigation that may result in you having a formal interview under caution, then you should always seek legal advice.

If there is a crisis situation, good communication is key particularly where public safety is an issue. Generally, any hygiene issues should be dealt with swiftly but if there is a severe outbreak that affects your premises, then this is vital.

Don't become a scapegoat or a "dead duck". If you need advice, contact Nigel Lyons on 01752 675057 or email nigel.lyons@footanstey.com

Losing the (good)will to live ...

Buyers of trade-related property businesses – such as pubs, hotels, restaurants and cinemas should probably welcome recent guidance from HM Revenue & Customs (HMRC) on the apportionment of consideration to goodwill. HMRC's new view could mean there is less Stamp Duty Land Tax (SDLT) to pay.

However, every silver lining has a cloud. In particular, there is still some uncertainty on this issue which doesn't look like it will be settled any time soon.

Goodwill and property businesses

The tax treatment of the purchase of trade-related property businesses is complex, and the arguments relating to it seemingly endless. Very briefly, however, SDLT is payable on the amount paid for land and property, but not on goodwill. However, if you are buying a pub with a strong local following, or a hotel with an excellent chef, how much of the consideration should be apportioned to the property and land on which the business stands, and how much should be apportioned to the goodwill relating to the business itself?

Until recently, HMRC's argument was there was little or no goodwill attached to trade-related property businesses. The business could only make income by using its premises and could not be sold separately from those premises. Therefore, no part of the sale price could be attached to the goodwill, only to the sale of the premises – and consequently SDLT would be payable on the full sale amount.

Good news from HMRC

However, HMRC seem recently to have changed their minds on this point. They state in their guidance: "The view now is that if a business is sold as a going concern then the sale must include some element of goodwill. The question to be answered is not whether goodwill exists but what is the value of that goodwill?"

On the face of it, for buyers this looks like good news. If a significant value can be apportioned to goodwill (on a just and reasonable basis) on the purchase of such a business, then there is the possibility to save SDLT. Furthermore, in the case

of corporate buyers, the purchase of goodwill is tax deductible for corporation tax purposes.

The cloud ...

On the downside, if a buyer pays less for property, this is likely to reduce the amount of capital allowances that he can claim. In addition, the amount paid for goodwill won't form part of the acquisition price of the land for the purposes of chargeable gains tax, so there is a possibility that on the eventual sale of the business, the capital gains tax bill may be higher.

The uncertainty ...

HMRC's practice note sets out the Valuation Office Agency (VOA)'s view on exactly how to apportion the price paid for goodwill and land. VOA had been consulting with the Royal Institution of Chartered Surveyors (RICS) on this but, having asked RICS to comment on the guidance, then published it without consulting them further.

RICS have made no secret of their deep disappointment with VOA on this subject. Their view is that the VOA's approach as set out in the guidance is "fundamentally flawed" as well as "founded on misunderstanding and misconception".

Unfortunately, while VOA and RICS battle it out (and at the moment, both are maintaining a dignified silence), it is down to the unfortunate taxpayer to take a punt on how much consideration can reasonably be apportioned to goodwill and property when buying a business. It's probably fair to say that this is just what the average buyer of a pub **doesn't** need at the moment.

For further information on any tax issue contact Sarah Anderson, solicitor, on 01752 675105 or email sarah.anderson@footanstey.com

Foot Anstey Solicitors

legal solutions for life



Foot Anstey Solicitors value and respect your privacy. The data that we hold and gather is managed in strict accordance with the Data Protection Act 1998. The information we hold is used by Foot Anstey for marketing purposes only and will not be sold or disclosed to third parties. If you do not wish to receive further newsletters, invites etc from us, please email us at enquiries@footanstey.com or call us to remove your name from our mailing list. This update is for information only and does not constitute legal advice. © Foot Anstey 2009.

Senate Court
Southernhay Gardens
Exeter
EX1 1NT

t: +44 (0) 1392 411221
f: +44 (0) 1392 685220
DX: 8308 EXETER

Salt Quay House
4 North East Quay
Sutton Harbour
Plymouth
PL4 0BN

t: +44 (0) 1752 675000
f: +44 (0) 1752 675500
DX: 118102 PLYMOUTH 2

The Quad
Blackbrook Park Avenue
Blackbrook Business Park
Taunton
TA1 2PX

t: +44 (0) 1823 625600
f: +44 (0) 1823 625678
DX: 97177 TAUNTON (Blackbrook)

Princes House
Princes Street
Truro
Cornwall
TR1 2EY

t: +44 (0) 1872 243300
f: +44 (0) 1872 242458
DX: 81200 TRURO

enquiries@footanstey.com
www.footanstey.com

Foot Anstey is regulated by the
Solicitors Regulation Authority