

Chapter 19

Licensing Legislation

19.1 Introduction

In public law administration, two kinds of system are commonly used in order to authorise the carrying on of an activity that would otherwise be prohibited: **licensing** and **registration**.

A **licence** is a legal device by which permission is granted, in public law terms normally by the Government or a public authority, by means of some form of official document to carry on the activity. A simple form of licence is often referred to as a permit. **Registration** is a process used for official recording of persons and/or activities in an authoritative list.

Registration usually would, and licensing might, involve the person concerned satisfying certain legally prescribed requirements. Registration might even be automatic in those circumstances.

Both systems could run concurrently, as it is not uncommon for:

- a register to be required of those persons to whom licences have been granted
- or
- a licence (often in the form of a practising certificate) to be required to be taken out by those who have been registered.

19.2 The purposes of licensing and registration

The following principal purposes can be identified:

- the laying down of minimum standards or qualifications for the carrying out of a specified activity, with which applicants must comply
- creating official awareness of those engaged in the relevant activity
- continuing supervision of an activity
- control of the numbers of those engaged in a particular activity
- the raising of public revenue, or recouping of administrative costs involved.

Legislative counsel needs to establish clearly whether the purpose of the scheme involves one or more of the following:

- to enable a selection process to operate
 - merely as to suitability or
 - with the added intention of limiting numbers to be authorised
- to enable a check to be kept on prescribed activities
- to raise revenue
- to control activities which involve danger or represent a threat or potential nuisance to a section of the public
- to protect a resource so that it is not exhausted or overused.

While there may be good arguments in favour of a licensing regime, the **counter-arguments** also need to be kept in mind, and counsel needs, in appropriate cases, to be prepared to ask searching questions to clarify that policy-makers have considered the following potential problems:

- it involves administration, and hence the creation of an extra bureaucracy
- if not properly administered it can be a source of delay, expense and frustration to those affected
- it can be used as a vehicle for discrimination and corruption.

19.3 The contents of licensing legislation

Specific provisions need to be made for introducing a licensing system, as the power to do so will not be implied in a general power to control or regulate activities. The following are some of the main incidents of licensing, although the order in which they appear will not necessarily follow the order below.

19.3.1 The licensing/registration authority

Is an existing authority (e.g. a Minister, a local government authority, the police, the Central Bank) to be given the power, or is it necessary to establish one for the purpose? The latter course is more likely in the case of a registration regime.

19.3.2 The activity to be regulated

The Act must state with precision the activity or activities to be regulated and make it a criminal offence to carry on the activity unless registered or licensed:

A person who carries on the business of providing transportation services to the public without being the holder of a licence under this Act commits an offence.

Sometimes there is need for an ancillary offence such as falsely holding oneself out as being registered or licensed.

19.3.3 Application

The person or authority to whom, and the way in which, application is to be made must be provided for. Often application is required to be made in a standard form prescribed either in the Act or subsidiary legislation. The section concerned might be the place to set out any required qualifications or any disqualifications.

In cases where the grant of a licence might be a matter of public concern (e.g. liquor, gaming) there would need to be provisions for giving notice of an application and for objections to be lodged. In addition, in cases where there is a considerable risk of malpractice, the authority might want to require the giving of security.

19.3.4 Criteria for grant

These would depend very much on the type of licence granted. In a simple revenue-gathering exercise (e.g. television or motor vehicle licences), the criteria can be set out in the legislation, so that the grant will be automatic on payment of the requisite fee. But in many cases the suitability of the applicant will be a matter for assessment. Clearly this will involve a discretion in the authority to grant or refuse:

A person applying for registration under this Act must satisfy the Board that he or she:

- (a) is of good character and reputation;
- (b) is resident in Utopia; and
- (c) holds an approved professional qualification.

19.3.5 Processing of the application

Procedure is normally a matter of administration rather than law, but in cases where a person's livelihood or reputation might be adversely affected by refusal to grant, a right to be heard in person, or at least to make written representations, might be required. Courts would be likely in these cases to hold that the rules of natural justice require it. Provisions might be necessary relating, for example, to informing the applicant in writing of the reasons for refusal, particularly if there is to be an appeal procedure, or to giving the applicant the opportunity of making representations in person:

Before refusing an application for a licence the Council must give the person making the application an opportunity of appearing before, and making representations to, a committee of the Council.

19.3.6 Imposing of conditions

Where specified or prescribed conditions are to attach to a licence of a particular kind, these should be set out in the Act or subsidiary legislation. If the authority is to have the power to impose other conditions, there would need to be an express power to allow it to do so (it would be unsafe to leave such an important power to have to be argued as being a necessary incidental one).

A licensing authority may attach conditions and limitations to licences in addition to those provided for in regulations, but not in a manner inconsistent with this Act or the regulations.

19.3.7 Duration and renewal

Unless a licence is for a particular occasion (sometimes called an ‘occasional licence’), the duration period (commonly one year from the date of issue) must be provided for, probably in the Act. Provisions relating to **renewal** must be set out, particularly where these differ from those on original application (e.g. because a more streamlined procedure is to be involved). This aspect of things does not normally apply with respect to registration.

19.3.8 Variation

If the power to vary is required (e.g. to reflect a change in business premises) it should be stated.

The Authority may, by written notice, require the holder of a licence to return it to the Authority within 14 days to enable the licence to be amended.

If that power is exercisable by the authority of its own motion (e.g. to add conditions to a licence), then a procedure consistent with natural justice, for example provisions relating to prior notification, and the opportunity to make representations, probably need also to be included.

19.3.9 Suspension, revocation and surrender

These powers are not necessarily to be implied in a power to register or grant a licence but should be expressly dealt with. Again, principles of natural justice would normally require that the person to be affected be given an opportunity to make representations. In cases of surrender, actual delivery up of the document might not always be required unless, for example, in cases where a refund of part of a licence fee is available.

19.3.10 Transfer

A licence is normally personal to the grantee, but some licences, particularly those of a revenue-gathering character (e.g. a motor vehicle licence), or where the licensee dies, may be transferable:

On the death of the holder of a licence, the personal representatives of the deceased are to be treated as the holders of the licence for 3 months from the date of death or any longer period the licensing authority may approve.

Provision should be made for conditions, if any, which are to apply to transfer (e.g. notification, possibly in a prescribed manner, to the authority).

19.3.11 Appeals

If provided for, these would apply in cases of refusal to register, or grant or renew a licence. An appeal procedure would normally be confined to cases where the applicant or licensee stands to lose economically or in reputation. The matter of exactly who has the right to appeal (is it to be extended to persons other than those directly affected?), the grounds, the appeal authority, the time limitation applicable and the powers of the appellate authority need to be provided for.

19.3.12 Display and production for inspection

If there are precise requirements for display, these must be set out. Apart from these, there would normally need to be some fairly good reason to require production for inspection (e.g. suspicion of conducting a regulated business without a licence).

19.3.13 Inspection of register

The issue of whether or not a register is to be open for public inspection must be considered. Are there public interest issues bearing on the matter?

19.3.14 Enforcement

Powers of appointment of inspectors, and of entry and inspection of documents relating to the licensed or registered activity, might be required, with offences and penalties in respect of obstruction.

19.3.15 Subsidiary legislation

Procedural arrangements, prescription of fees and forms, and other administrative details, are commonly left to be dealt with by subsidiary legislation.

19.4 Typical transitional and savings provisions relating to licences

19.4.1 Automatic grant of licence, or registration, in certain cases

If a person who was an operator of a retirement home immediately before the commencement of this Act applies in the prescribed manner for a licence under section 5 within 60 days of the commencement:

- (a) the licensing authority must then issue a licence to that person in respect of the premises in which he or she was operating; but
- (b) the provisions of this Act operate [note: *not shall operate*] in respect of that licence.

Where at the commencement of this Act a person was practising accountancy, and had been continuously so practising for not less than 5 years immediately before commencement, that person is to be taken to be qualified under section 26 and is entitled to be registered under this Act.

19.4.2 Time to be granted to apply

A person who immediately before the coming into force of this Act was operating a zoo may continue to operate that zoo without a licence under this Act:

- (a) for a period of 6 months beginning with that date; and
- (b) if within that period he or she applies for a licence, until that application is finally disposed of or withdrawn and, if the application is refused, for a further period of 6 months from the date of refusal.

19.4.3 Postponement of operation of law

A person must not, after a period of 6 months from the date of the commencement of this Act, carry on business as a tourist guide...

19.4.4 Temporary option to choose law

During the period of 3 months from the commencement of this Act, a person who wants to begin constructing, altering or demolishing a building may, at that person's option, apply:

- (a) for a building permit under this Act; or
- (b) for the permit that would have been required if this Act had not come into force, in which case the application is to be dealt with as though this Act had not come into force.