

Guidelines issued by the Minister for Enterprise, Trade and Employment for Local Authorities for the carrying out of their Functions under the Casual Trading Act 1995

1. **Legal Advice from Office of the Attorney General**

The following is a summary of the advices of the Office of the Attorney General given to the Department on issues raised by Local Authorities and others in respect of the Act over the years. This is the advice given to the Department and does not obviate from the necessity of Local Authorities to seek their own legal advice.

2. **Definition of Goods**

The context of the request for advice in this case was the exemption under the Casual Trading Act 1980 for the selling of “agricultural and horticultural produce (including livestock) by the producer thereof or his servants or agents”. The query asked whether cattle were goods for the purposes of the 1995 Act. The advice was that the term “goods” in the definition of casual trading in section 2 (1) of the 1995 Act covers cattle. Further the fact that “goods” are not defined implies that this phrase must be given the widest possible definition. However this range of meaning is not unlimited. In another instance where the question arose as to whether lines or lottery tickets were “goods” for the purposes of the Act the advice was less clear-cut. The advice was that the safest course was to treat the sale of lines and lottery tickets as not coming under the definition of “goods”. It should be noted that Local Authorities have powers under section 2 (4) of the Act to add for their own functional areas new classes of exemptions.

3. **When does a Local Authority comply with section 6 (6) of the Act?**

Section 6 (6) of the Act describes the publication, consultation and appeal process for the making of bye laws. There has been some confusion as to the time sequence for these various subsections. The advice of the Office of the Attorney General is that the order is consecutive. For ease of reference the following is the sequence:

Section in Act	Action	Time Period
S 6 (6) (i)	L. A. publishes notice on proposed bye laws in newspapers.	Not less than one month for inspection of proposed bye laws.
S 6 (6) (ii) & S 6 (7)	A person may make a submission in writing to the L. A. in relation to the bye laws.	Within two weeks after the period in S 6 (6) (i).

S 6 (8) (a)	A person aggrieved by the proposed bye laws may appeal to the District Court against the proposed bye laws.	Within 21 days beginning on the day the L. A. complies with S 6.
S 6 (11)	L. A. cannot make bye laws before certain period.	After compliance with the above the L. A. must wait 30 days or if an appeal is before the courts it must await the determination of the court.

4. **Amending Bye Laws under Section 6 (6) of the Act**

There is no provision under the Act for the amending of bye laws made by Local Authorities. However the advice of the Office of the Attorney General is that notwithstanding the absence of a specific provision regarding the amendment of bye laws Local Authorities should go through the process in section 6 (6) of the Act in cases where the change is substantial. In the instance giving rise to the advice the Local Authority intended to dedesignate a casual trading area from bye laws already subject to the section 6 (6) process. It would be a matter for each Local Authority to determine what is substantial. However to avoid possible legal challenges it would be advisable to go through the process in section 6 (6) of the Act.

5. **Filling Vacant Pitches**

When a trading space becomes vacant for whatever reason there is an obligation on the local authority to allocate this space to an applicant for a casual trading licence. Under section 4 (5) the only circumstances (apart from persons with convictions under the Act) whereby a local authority can refuse to allocate a space are (a) where the applicant fails to furnish a completed application form, (b) where the applicant fails to pay the appropriate fee and (c) where there is no trading space available. If the local authority wishes to dedesignate any vacant spaces the legal advice is that they should go through the process in section 6 (6) of the Act (see par. 4 above)

6. **Market Rights**

A “market right” is defined in section 1 (1) of the Act as “a right conferred by franchise or statute to hold a fair or market, that is to say, a concourse of buyers and sellers to dispose of commodities”. Market rights arose over the centuries and were usually granted by royal charter or statute to individuals or to locations (i. e. to the burghers of a particular town). Information on these markets rights is limited. There is a survey carried out in the late nineteenth century which gives details on the locations and the days on which markets were held. However as for the original charters it would be for those interested in them to initiate searches.

Markets subject to market rights were excluded from the scope of the Casual Trading Act 1980 but this was reversed in the current Act. There has been increased interest in markets recently with a case¹ in Bantry, Co. Cork in 2002 resulting in the High Court granting an interlocutory injunction to a trader restraining the County Council from interfering with a market in the town. The market right in question was one granted by the Crown to the First Earl of Cork in the seventeenth century. One of the points made by the judge was that previous case law suggested that the right of a member of the public to trade at a place covered by a market right was in the nature of a proprietary right.

The issue of the status of market rights was referred to the Office of the Attorney General for advice. That Office's view is that there is a serious question mark on the regulation of trading pursuant to a market right under the Act. The reason is that the use of the Act to restrict trading pursuant to a market right might be considered an attack on the property rights of people trading and thus unconstitutional under Article 43.3.2 of the Constitution.

Please note that a High Court case is pending which may result in that Court or the Supreme Court determining the status of market rights. This court case may also have an impact on Section 7 (4) of the Act which deemed market rights unexercised by 1st May 2006 to be extinguished.

7. **Case Law affecting Casual Trading**

The so called taxi case² was decided in the High Court in 2000 and is of relevance to casual trading regulation. The relevant extract is as follows;

"125. It seems clear to me that the imposition of a licence fee in the case of Dundalk Urban District Council where such a fee is related to the capital value of the subject of a licence is indeed in the nature of a tax. It is clearly not limited to the administration of the licence or to the regulation and control of same. It does not seem to have been in the contemplation of the legislature to delegate to the Minister such a right let alone allow the Minister to delegate to a local authority. Indeed such a right is more properly reserved to the Oireachtas".

8. **Waste Disposal**

There are three options open to traders to dispose of their waste (i) have the local authority take it away for a fee, (ii) arrange for a private waste disposal company to do it or (iii) the trader can do it

¹ Simmonds v. Cork County Council [2002] IEHC 17 (22nd February 2002).

² Humphrey v. Minister for Environment and Local Government [2000] IEHC 149 1 ILRM 241 (13th October 2000).

himself. Of course options (ii) and (iii) must comply with the Waste Management Act 1996 and relevant EU regulations/directives. The implication of this is that if traders opt for option (ii) or (iii) the local authority cannot charge extra for disposing of the trader's waste.

Traders are reminded that if they choose the option of disposing of their own waste and either fail to do so or do it in a way which infringes the Waste Management Act 1996 they are liable to be charged by the local authority. Traders are also reminded of their responsibilities under the Protection of the Environment Act, 2003 and the Litter Pollution Act 1997.

9. **Ministerial Exemption under Section 2 (3) of the Casual Trading Act 1995**

The Act in section 2 (2) contains a list of types of trading which are excluded from the scope of the Act. The exemptions in section 2 (2) apply nationally. Section 2 (4) provides that local authorities can add to the national exemptions in section 2 (2) but only for their own functional areas. Some local authorities have used their powers under section 2 (4). The Minister can exempt classes of selling from the scope of the Act and has done so in the case of certain fruit and vegetables in S. I. No. 191 of 2004 (sale of fruit and new potatoes from 1st May to 30th September). It is recognised that there are issues which are national or regional and which cannot be solved by a single local authority. The Minister reserves the right to use his powers under section 2 (3) of the Act to resolve such problems.

Categories of selling exempted from the Act represent a challenge for traders and regulators alike. Because such categories are exempted from the Act they are not subject to the controls or sanctions in the Act. It is in the interest of all concerned that trading take place in an orderly manner. To this effect traders and local authorities should endeavour to cooperate on a voluntary basis to ensure that trading takes place in an orderly fashion.

The exemption for the sale of certain fruit and vegetables under S. I. No. 191 of 2004 is limited to the fruit and vegetables (in effect only one vegetable is covered by the exemption, new potatoes). There may be an impression that all agricultural and horticultural produce are exempt. This was the situation under the Casual Trading Act 1980 but is no longer the case. Therefore the sale of Christmas trees in a public place is not exempt from the Act and traders need a licence. Categories of selling exempted from the Act are still subject to other laws such as litter or traffic regulations.

10. **General Principles of Casual Trading**

Local authorities should acknowledge that casual trading makes a valuable contribution to local economies. The Act requires that they regulate this activity and this should be done in good faith. As a

general rule if casual trading has been carried on in a town or other location in the past there should be a presumption that it should carry on into the future.

Local authorities should actively promote casual trading as it contributes to the economic benefit of consumers.

Local authorities in formulating their policy and bye laws on casual trading should actively consult casual traders (i. e. not just rely on the process in section 6 of the Act). The idea behind this guideline is that local authorities should not merely rely on notices in the newspapers. Existing traders should be contacted, as should traders interests groups. In other words the local authority should endeavour to go beyond the strict legal requirement in Section 6 (6) (a) of the Act.

11. **Fees for Casual Trading under section 6 (2) (d)**

Local authorities have the power under section 6 (2) (d) of the Act to set the fees for casual trading. Further under section 6 (6) of the Act local authorities do not have to subject the setting of fees to the consultation and appeal process described in sections 6 (6) to 6 (11) of the Act.

However the implication of the “Taxi” case described above and the option given to local authorities under section 6 (4) that fees may be set having regard to the facilities and services provided by them indicates that local authorities should not use casual trading as a revenue stream and that fees should be directly linked to facilities provided.

The setting of fees should be transparent and in this context local authorities should indicate in writing how their fees are set and the facilities provided by them for traders.

12. **Insurance**

The decision to take out insurance should be one for the trader. Conditions in licences regarding insurance should not act as a barrier to entry for casual trading.

Many local authorities state that traders should have public liability insurance. However in most cases no explanation was given for this beyond stating that their insurers recommended this. If traders are to be obliged to take out insurance there should be verifiable evidence that traders not having insurance is the cause of loss to local authorities and/or members of the public. If it is the case that local authorities feel that the actions or negligence of traders might result in legal action being taken against them it may be possible for the local authorities to enter into a legal agreement with traders whereby they the traders agree to be responsible for their own actions or negligence.

13. **Parking, Pitch Size, etc**
Traders need access to pitches and the capacity to load/unload products from vehicles. There is also a need for a minimum sized pitch to set up a stall. It is difficult to set national quantitative guidelines for this topic. However as a matter of principle local authorities should recognise the need for facilities in the area of pitch size and provide these for traders.
14. **Farmers Markets**
Farmers markets have become popular in many parts of the country. From a legal perspective farmers/growers selling their produce in a public place are no different from any other traders. This means that if the local authority has issued bye laws under Section 6 of the Act farmers/growers must have valid casual trading licences. However local authorities have a large discretion in how they operate casual trading. Elsewhere in these Guidelines (see point 19) the recommendation of the Consumer Strategy Group that local authorities grant more licences for fruit and vegetables selling. By favouring farmers/growers in issuing licences local authorities can fulfil that recommendation. It is within the power of local authorities to exempt farmers/growers selling their own produce from the Act under Section 2 (4). However local authorities may wish to regulate the activity rather than exempt it. The question has arisen as to whether a local authority can issue one licence for a farmers market to an organisation or an individual. There is nothing in the Act to prevent this. However there are issues of equity which would have to be taken account of. If farmers/growers are to benefit from not having to have individual licences the local authority would have to ensure that only *bone fide* farmers/growers benefited from the system. Local authorities should also ensure that a private organisation did not control entry to the market. This should be a function of the local authority as should the overall running of the market. Finally farmers markets taking place on private property are not covered by the Casual Trading Act 1995.
15. **Times during which Casual Trading can take place**
There is nothing in the Act which prescribes the times during which trading can take place. However section 4 (3) (a) of the Act states that a casual trading licence shall contain such conditions as the local authority determines. This can include conditions relating to the times of trading. However such conditions should not place casual traders in a position less favourable than other traders in a specific location.
16. **Event Trading**
Under section 4 (1) (a) (iii) of the Act provision is made for what is called event trading. These licences refer to one off events such as

sporting events, concerts, festivals etc. Of their nature these events attract crowds of people. Traders who have paid for licences are entitled to trade at these events. Every effort should be made by local authorities to ensure that spaces are available for traders when they turn up to an event.

Local authorities should consult with an Garda Síochána beforehand to ensure that the location of casual trading pitches do not interfere with traffic or crowd control measures.

17. **Location of Designated Casual Trading Areas**

Casual trading has existed in Ireland since time immemorial. The trading usually takes place in the oldest part of the town or city and as well as providing products to the consumer the traders also create an ambience. Efforts to replicate trading in a different part of the town or city usually end in failure. Equally efforts to recreate trading once it has gone can prove difficult.

Local authorities should ensure that where casual trading has taken place in a particular location that this should continue.

Some local authorities have requested that the word “ensure” in the sentence above be changed to “endeavour”. The reason being that relocation may be necessary due to redevelopment. It is not the intention to hinder redevelopment in towns. It is perfectly understandable that redevelopment would make casual trading physically impossible. The point of guideline 16 is that casual trading should take place in the retail centre of towns and not in some remote part of the town which appears to be the case in some locations. Of course local authorities may wish to develop casual trading in different parts of towns but this should not be at the expense of allowing casual trading in the town’s retail centre. If redevelopment involves closing off these areas until the redevelopment is complete this will probably involve disruption to all kinds of trading and this is understandable. It is also recognised that the retail centre of a town may not be the oldest part. Changes over time occur and the retail centre may have shifted to another area. Another factor is the physical size of retail centres in towns which of their nature may not be able to accommodate the demand for trading pitches. Given all these factors the principle should now be: local authorities should have a commitment to promote casual trading in the retail centres of their towns. This is without prejudice to the development of casual trading elsewhere in towns and without prejudice to the need to redevelop towns’ retail centres.

18. **Excess Demand for Licences**

There are areas where there is excess demand for licences. In these cases local authorities should state in their bye laws the system for allocating licences in these circumstances. The principle for allocating pitches in situations of excess demand must be fair and

transparent. There may be a number of such systems. One would be a waiting list where those on the waiting list longest have access to vacant pitches (there should also be a rule of one pitch per person in excess demand circumstances). Another system could be the drawing of lots for pitches. Local authorities should choose their own system as long as it is fair and transparent.

19. **Fruit and Vegetables**

The Consumer Strategy Group (CSG) recognised that Ireland is the most expensive country in the eurozone for fruit and vegetables. Some of the factors resulting in higher prices include higher production costs and a moderately concentrated market with three quarters of produce sold in multiples. To counter this the CSG recommended that local authorities grant most casual trading licences for those selling fruit and vegetables and this recommendation is endorsed in these guidelines.

20. **Contact Persons**

Local authorities should nominate and publish the name and contact telephone number of an official/s dealing with casual trading as a focus for information for traders, the public and others interested in casual trading.

Department of Enterprise, Trade and Employment
July 2006