



# LEGISLATIVE DRAFTING WORKSHOP

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# Licensing Regimes



# Licensing Regimes

- ▶ License vs Registration vs Permit
  - Licence – period of time
  - Registration – “one-time” or period of time
  - Permit/approval – individual events
- ▶ Same legal effect
  - Cannot carry out activity without registration, licence, permit or approval



# Licensing Regimes

- Who may issue licences?
- Who may apply for licence?
  - Description of applicant
  - Qualifications
- What activity is to be licensed?
  - Sanction
  - Exemptions?
- What is the application procedure?
  - Documents and information required
  - Prohibit provision of false information etc.
- Fees



# Licensing Regimes



- What are the considerations for granting the licence?
- How long should the licence be for?
  - Renewal
  - Suspension or revocation
    - Provide reasons
    - Right of hearing
- Is there a right of appeal?
  - Against refusal to issue or renew licence
  - Against suspension or revocation of licence
  - Against new conditions



# Licensing Regimes

## ➤ Licence obligations

- Set out in the law or as licence condition?
  - In the law, if –
    - Obligation is of general application
    - Obligation is substantive or affects third parties
    - Contravention of obligation is to be an offence
  - As licence condition, if –
    - Obligation applies only in a particular case
- Where obligations appear as licence conditions, consider providing in the law power to add to, vary or remove conditions



# Licensing Regimes

- ▶ Some common obligations
  - Licence to be exhibited or produced on request
  - Licence to be returned if suspended, revoked or terminated
  - Licensee to notify change of address or cessation of activity
  - Licensee to keep records
  - Licensee to periodically submit returns
  - Licensor to maintain register of licensees



# Licensing Regimes

## ▶ Sample licence provisions

### **“X activity not to be carried on without licence**

**10.** (1) No person shall carry on the activity of X without a licence issued by the Authority for that purpose.

(2) The Authority may issue the licence with or without conditions or may refuse to grant the licence.

(3) A licence issued under this section may include conditions requiring the licensee to pay to the Authority a fee of \$100 on the grant of the licence.

(4) Every licence issued under this section shall be in such form and for such period as the Authority may determine.

(5) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a fine not exceeding \$10,000, imprisonment for a term not exceeding 12 months or both.

(6) Any person aggrieved by –

(a) the refusal of the Authority to issue or renew a licence; or

(b) the cancellation of a licence,

may, within 30 days after receiving the Authority's notification of its decision, appeal to the Minister whose decision shall be final.”



Enforcement



# Enforcement

- Breach of licence provisions – what sanctions?
  - Criminal vs non-criminal sanctions
  - Non-criminal sanctions
    - Administrative financial penalties
      - Cannot be an offence
    - Administrative actions
      - Suspension or revocation



# Enforcement

- Enforcement provisions to be included
  - Appointment of inspectors
  - Powers of inspectors
    - Right of entry
    - Right to require answers to questions
    - Provision of documents and information
    - Power to inspect, take samples or seize goods
  - Offence to obstruct inspectors
  - Protection of inspectors from personal liability



# Appeal Framework

- Right of appeal
  - Appeal against –
    - Refusal to issue or renew licence
    - Suspension or cancellation of licence
    - New conditions
  - Appeal body
    - Minister
    - Specially constituted appeal body
  - Time limit for appeal
  - Powers of appeal body



# Common Problems with Licensing

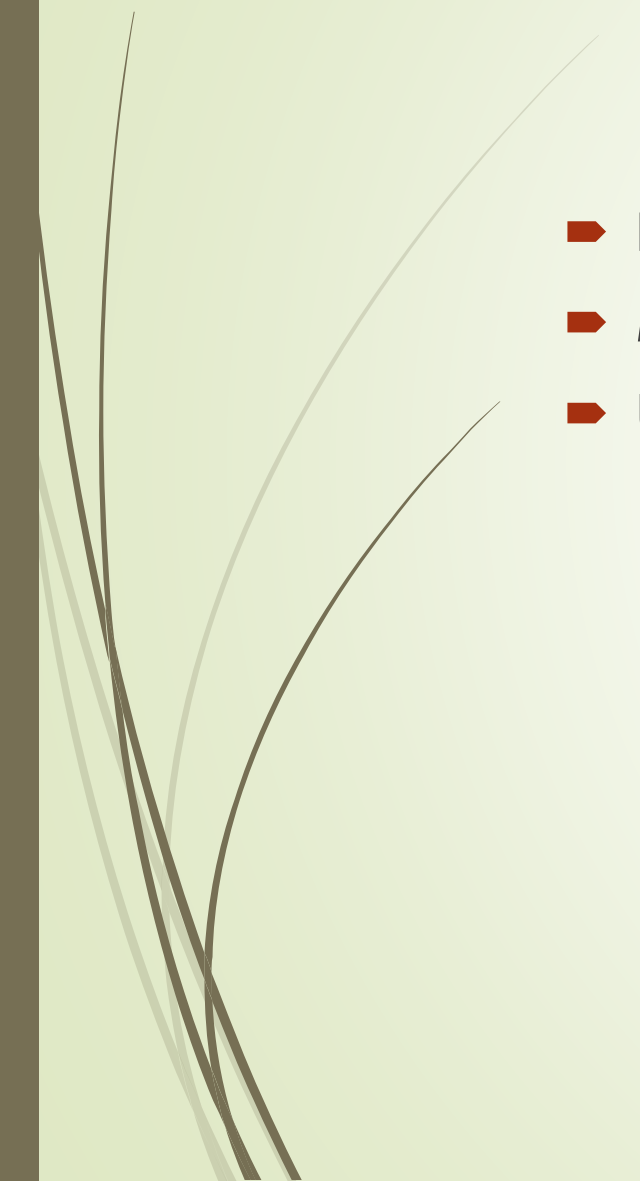
- Different/additional qualifications/disqualifications in subsidiary legislation
- Assumption that qualifying conditions continue to apply to licensees during licence term
- Unreasonable licence conditions
- Making laws under guise of licence conditions
- Different authorities in Act and subsidiary legislation
- Renewal of licence after lapsing



# Savings and Transitional Provisions



# Savings and Transitional Provisions

- Needed to ensure smooth transition to a new regime
  - Minimum disruption as a result of change in law
  - Usually appear at the end of Order or subsidiary legislation
- 





# Savings Provisions

- ▶ Preserves an existing law, right or obligation that would otherwise cease to have effect under new law
  - *Example* – Law creates new licensing regime to replace an existing one
    - Q: What happens to licences already granted?
    - A: A savings provision is needed if they are to continue to have effect



# Savings Provisions

- ▶ Typical matters requiring savings provision
  - Institutions or offices under old law
  - Appointments made under old law
  - Subsidiary legislation under old law
  - Legal proceedings commenced but not completed under old law
  - Rights of appeals already accrued under old law
  - Rights to recover penalty or damages under old law
  - Licences issued and still in force under old law
  - Rights or benefits subsisting under old law
  - Fulfilment of a period of time under old law for purpose of new law



# Savings Provisions

- Drafting savings provision

- Identify old law to be saved
- Identify matters to which saved law is to apply (X)
- State any modification (if any)

- *Examples –*

- Notwithstanding new law, X shall be dealt with as if old law continues to be in force

- Nothing in new law affects the operation of old law in relation to X

- X continues to be in force as if made under new law



# Savings Provisions

- ▶ Sample savings provisions

**“Savings provisions**

**50.** (1) Any subsidiary legislation, declaration or appointment made and anything done under the repealed Act and in force immediately prior to the commencement of this Order shall, so far as it is not inconsistent with the provisions of this Order, continue to be in force as if made or done under this Order until it is amended or revoked under this Order.

(2) Any permission, approval, endorsement, decision, notice, warrant, order, guidelines or other document prepared, made, granted, issued and any act or thing done or given under or pursuant to the repealed Act shall, so far as it is not inconsistent with the provisions of this Order, be deemed to have been prepared, made, granted, issued, done or given under or pursuant to this Order.

(3) Any enforcement process or proceedings commenced or pending immediately prior to the commencement of this Order in connection with any breach, contravention or non-compliance of or under the repealed Act may be continued and disposed of under the repealed provisions as if this Order has not been made.”



# Transitional Provisions

- Provides smooth transition from old regime to new regime
  - *Example* – grant of grace period for compliance with new law
- Applies to cases or activities started before commencement of new law
- Provides that old law applies with modifications to those cases or activities
- It may be unrealistic to ask people who have started activities under old law to comply with new law immediately
- Complicated changes may need a longer phase in time
- Postponing commencement of new law may not be an option



# Transitional Provisions

- ▶ Typical matters requiring transitional provisions
  - To continue commenced proceedings
  - To apply or modify new procedures to existing cases
  - To phase in new law



# Transitional Provisions

- Drafting transitional provisions

- Identify cases started under old law to be continued under new law (X)
- Decide whether new law can apply with or without modifications

- *Examples –*

X done under old law that is valid and in force may be continued as if done under a corresponding provision of new law

X issued under old law shall continue to be in force for a period of 3 months after commencement of new law or the date of expiry of X, whichever is earlier



# Transitional Provisions

- ▶ Sample transitional provision

**“Transitional provision**

**51.** Any person who immediately before the date of commencement of this Order was operating X may continue to operate X without a licence under this Order –

- (a) during the period of 6 months beginning with that date; and
- (b) if within that period application is made for a licence under this Order, until the date on which a licence is granted to him, or on which his application is refused or withdrawn.”





# Savings and Transitional Provisions

- ▶ Savings and transitional provisions in Interpretation and General Clauses Act (Chapter 4)
  - Section 9 of Interpretation and General Clauses Act
    - Provides that where any written law is repealed, subsidiary legislation made thereunder remains in force so far as not inconsistent with new written law until revoked or replaced by subsidiary legislation made under new written law
  - Section 10 of Interpretation and General Clauses Act – Effect of repeal
    - Does not revive anything not in force or existing at the time of repeal
    - Does not affect anything done under previous operation of repealed law
    - Does not affect any right, power, obligation, restriction or liability acquired, accrued, imposed or incurred under repealed law
    - Does not affect any penalty, forfeiture or punishment in respect of offence committed under repealed law
    - Does not affect any investigation, legal proceedings or remedy to enforce right, power, obligation etc. acquired etc. under repealed law



# Savings and Transitional Provisions

- ▶ Drafting savings and transitional provisions
  - Start drafting only when draft Order has reached advanced stage
  - Go through every substantive provisions of new law to see how it impacts cases under old law
  - Consider how much of the old law is to be saved and whether it needs modification
  - Identify possible cases and activities started under old law
  - State the transitional provision for these cases and activities and any time limit



# Exemptions



# Exemptions

- ▶ Sample exemption provision

  - ▶ **General exemption**

    - ▶ The Minister may, with the approval of His Majesty the Sultan and Yang Di-Pertuan, by order published in the *Gazette* and subject to such conditions as he may impose, exempt any person or class of persons from all or any of the provisions of this Order.”

- ▶ Section 21 (2) (b) of Interpretation and General Clauses Act (Chapter 4)

  - ▶ A power to grant a ..... exemption includes power to impose reasonable conditions subject to which such ..... exemption may be granted



# Exemptions

- Purpose of power of exemption
  - To ensure the law does not operate unjustly or in an unintended way
    - *Example* – the peculiar circumstances of an individual may be such that it would be onerous or impossible for him to comply with the law or may result in hardship if he had to comply with the law




# Exemptions

- Exercise of power of exemption
  - Exemptions are **the exception**, and not **the rule**!
  - Do not exempt all persons who are subject to an Act from the Act or any provision
    - This amounts to a repeal of the Act or provision
    - If, as a matter of policy, it has been determined that a law will not apply to certain classes of persons, the exception should be specifically mentioned in the law
      - This is consistent with transparency and good governance



# Exemptions

- ▶ Section 3(1) of Interpretation and General Clauses Act (Chapter 4)
  - “subsidiary legislation” means any regulation, order, Proclamation or other instrument made under any written law and having legislative effect
- ▶ An exemption determines the parameters of a law, and therefore has legislative effect



*Thank you!*

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