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Irresponsible promotion of alcohol – section 237 two years on

It is a little over 2 years since new rules on irresponsible promotion of alcohol first came into effect. So what have we learned over that time? The short answer is that there remain more questions than answers.

Under section 237 of the Sale and Supply of Alcohol Act, literally anything that someone does that encourages or is likely to encourage excessive consumption of alcohol in to course of carrying on a business – whether on licensed premises or not – is now an offence. In addition, outlaws a number of specific promotional practices relating to discounts, free offers and advertising to minors.

As many predicted, the open-ended and ambiguous drafting of section 237 has proved difficult for businesses and enforcement agencies to apply in practice. And there are very few sources of publicly available and authoritative guidance available to assist with interpreting section 237.

The Health Promotion Agency (HPA) has some written guidance on its website regarding the promotion of alcohol, although this does little more than recite the provisions of section 237. More recently, the Auckland Council has written to licence holders setting out its approach in greater detail to the enforcement of certain aspects of the new rules under section 237.

But these sources are limited in their scope and they are not for the most part backed by definitive court decisions – for the simple reason that there have been very few court decisions of relevance.

We do have a handful of licensing decisions touching on section 237 where indications can be found as to what might be considered likely to encourage excessive consumption in general, such as:

- making incentive payments resulting from alcohol sales to staff at an adult entertainment venue,
- selling wine by the bottle only and not by the glass;
- selling full strength spirits in 500ml service sizes if not overtly managed to ensure no irresponsible promotion or consumption occurs;
- offering a “happy hour” on a printed menu.

But the offences for specific promotional practices remain particularly problematic.

One example is the offence of promoting or advertising alcohol in a way that is likely to lead people, to believe that the price is 25% or more below the price at which the alcohol is ordinarily sold (except in-store or in an online price list or catalogue).

Printing flyers with a comparison price by which the public could calculate that the discounted price was more than 25% lower is a fairly obvious breach, as is an advertisement that specifically mentions a discount of 25% or more.

Increasingly, businesses are promoting a single price without a comparison or mentioning of a specific discount. But care still needs to be taken with the overall presentation - words such as 'crazy prices' or 'massive discounts' could suggest a discount of 25% or more.

Online and remote sales have an exemption for discounts in a "catalogue or similar price-list". But what exactly does this mean?

The original intent was that remote sellers - mail order and online - should be treated in the same way as "bricks and mortar" premises, where a full range of products can be displayed in-store including products discounted by 25% or more.

Auckland Council has advised licensees that the exemption only applies only to "a catalogue contained on the website" of relevant licensees - implying that a catalogue should be some sort of separate document on the website.

But the licensee is not required to group all of the products in one particular space. And a website generally functions as a sort of interactive catalogue or price list. So the intent of the law could arguably be met by allowing any pricing information a website to be considered a price list or catalogue.

These are just a few of many examples where section 237 has created uncertainty and an uneven playing field for businesses as well as making enforcement difficult and vulnerable to challenge.

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