

BIRMINGHAM CITY COUNCIL

**REPORT OF THE SERVICE DIRECTOR REGULATION AND ENFORCEMENT
TO THE LICENSING AND PUBLIC PROTECTION COMMITTEE**

15 JULY 2015
ALL WARDS

**REPORT ON THE CURRENT POSITION REGARDING REGISTRATIONS
UNDER THE SCRAP METAL DEALERS ACT 2013**

1. Summary

- 1.1 In response to a request from the Licensing and Public Protection Committee, this report provides an update on the current position regarding registrations under the Scrap Metal Dealers Act 2013.
- 1.2 Since the Act's enactment on 1 October 2013 officers have granted 243 collector's licences and 66 site licences.
- 1.3 A recent decision of the Supreme Court in respect of Sex Shop licence fees has helped to clarify that scrap metal licence fees may not be used to fund enforcement against unlicensed collectors. This report proposes the limited use of assets recovered under the Proceeds of Crime Act 2002, and held in reserve by this committee, to fund enforcement activity against unlicensed scrap metal dealers.

2. Recommendations

- 2.1 That the report be noted.
- 2.2 That outstanding minute 448(ii) be discharged.
- 2.3 That the funding arrangements detailed in paragraph 8.3 be agreed.

Contact Officer: Chris Neville, Head of Licensing
Telephone: 0121 303 6103
E-mail: chris.neville@birmingham.gov.uk

3. Background Information

- 3.1 Local authorities have been required since 1 October 2013 to implement a licensing scheme under the Scrap Metal Dealers Act 2013 (SMDA). This new Act replaces the previous registration system for scrap metal dealers under the 1964 Scrap Metal Dealers Act. The new Act also incorporates the existing registration requirements for motor salvage operators which are currently set out in the Vehicles (Crime) Act 2001 and Motor Salvage Operators Regulations 2002.
- 3.2 A SMDA licence must be in the form of a 'site licence' or a 'collectors licence' and a site licence can authorise the licensee to carry on a business at any site (or sites) within a local authority's area identified in the licence.
- 3.3 The Home Office set out transitional arrangements that relate to scrap metal dealers, scrap metal collectors and motor salvage operators that held registrations under the 1964 SMDA on 1 October 2013. The transitional arrangements were as follows:
- I. All relevant operators can apply for a scrap metal dealer's licence from 1 October 2013.
 - II. A scrap metal operator who is currently registered under the SMDA 1964 or Vehicles (Crime) Act 2001 needs to submit an application on or by 15 October 2013 and will be deemed to have a temporary licence which is valid until a licence 'decision' is issued. The decision is based upon whether the applicant satisfies the 'suitable person' test. While their application is being considered by the local authority, these operators will be able to operate as if they had a licence so as to maintain business continuity.
 - III. If a scrap metal dealer or motor salvage operator who is currently registered does not submit an application under the transitional arrangements on or by 15 October 2013 their deemed licence will lapse on 16 October 2013. A deemed temporary licence which has lapsed does not give rise to a right to appeal. The dealer must submit an application and wait for a licence to be issued before they can trade legally.
 - IV. A Local Authority can impose conditions on a deemed temporary licence pending an appeal for the refusal of a licence.
 - V. Scrap metal dealers/collectors or motor salvage operators who are not registered under the SMDA 1964 or the Vehicles (Crime) Act 2001, can apply for a scrap metal dealers licence from 1 October 2013 but must wait for a licence to be issued before they can operate.
- 3.4 The following table details the number of applications/determinations to date.

Type of Applicant	Applications	Transitional Applications	New Applications	Withdrawn Applications	Licences Issued	Pending Determination
Collectors	328	81	247	64	243	21
Sites	73	48	25	2	66	5

- 3.5 The Licensing Service has invested considerable resources into ensuring that each applicant has been carefully vetted, so far as the legislation permits, to ensure that applicants pass the 'suitable person test' before being granted a licence. The Local Authority is required to consider applicants against a prescribed list of relevant criminal offences. In Birmingham every applicant has been asked to attend a face to face interview with an enforcement officer to make an assessment before we agree to grant a licence.

4. E-CINS

- 4.1 Birmingham has signed a data sharing agreement with British Transport Police, Staffordshire Police, West Midlands Police, the Environment Agency and 15 other local licensing authorities to enable each signatory to share scrap metal dealer information with each other. The result is a web based computer system called E-CINS which enables scrap metal dealer licence application information and licence details to be shared. This assists local authorities when dealing with new applications to establish whether the applicant holds licences elsewhere. It is also helpful to the police to support roadside enforcement, enabling them to verify the licence details of anyone who is stopped.

5. Scrap Metal Licence Fees

- 5.1 Fees for scrap metal licences are governed by a range of common law principles, however, the overriding determinant is Article 13(2) of the European Services Directive 2006. The philosophy of the Directive is to remove unnecessarily complex administrative barriers to the expansion or creation of service based businesses. One of the barriers can be disproportionate licence fees.
- 5.2 Article 13(2) of the Directive states: "Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures."
- 5.3 The meaning of Article 13(2) was considered in the case R (on the application of Hemming (t/a Simply Pleasure Ltd) and others) v Westminster City Council [2015] UKSC 25 (commonly referred to as 'Hemming v Westminster'), which began in 2011 in which a group of licensed sex shop owners challenged by way of Judicial Review the lawfulness of the fee charged by Westminster City Council for sex shop licences (which were £29,000 each). It was argued by those acting for Hemming that a licence fee could cover the cost of the authorisation procedure (as described by Article 13(2) of the Directive), which would include the process by which Westminster City Council considered each application and determined whether to grant a licence; but that it could not include the cost of carrying out enforcement against unlicensed sex shops. Westminster acknowledged that the cost of authorising a licence was

£2,000 and that the remaining £27,000 was allocated to enforcement against unlicensed premises.

- 5.4 Westminster City Council argued that enforcement against unlicensed businesses was an authorisation procedure and, therefore, it could include the cost in its licence fees. The High Court rejected this argument, as did the Court of Appeal. On 29 April 2015 the Supreme Court supported the decisions of the lower courts. However, it concluded that it would be permissible for a licensing authority to charge a licence fee in two parts: one would be an up-front fee to cover the cost of processing an application, and a second fee for managing the licensing system payable upon the grant of the licence. This second fee could include the cost of enforcement against unlicensed sex shop owners and that it would not be covered by Article 13(2).
- 5.5 However, any such fee would still need to demonstrate reasonableness and proportionality. In this case, 'proportionality' is defined by the Treaty of Rome and is called the Gebhard Test. There are four elements to the test. The fees must:
- i. be applied in a non-discriminatory manner,
 - ii. be justified by imperative requirements in the general interest,
 - iii. be suitable for securing the attainment of the objective which they pursue,
 - iv. not go beyond what is necessary to attain it.
- 5.6 Elements of the Supreme Court decision will be considered by the European Court of Justice next year, including whether the practice of charging an up-front fee for both elements of a licence on the basis of an agreement to refund the second element if the licence is not granted falls within the meaning of Article 13(2). It will also consider whether an applicant must demonstrate evidence of it having incurred a cost (such as loss of interest) before a fee can be considered a cost and thereby fall within the meaning of Article 13(2).
- 5.7 The case of Hemming was based on sex shop licences granted under the Local Government (Miscellaneous Provisions) Act 1982. The consequence of the Hemming case for scrap metal licence fees is that authorities may not include in their fee a charge for enforcement against unlicensed scrap metal collectors or sites. Section 6 of the Scrap Metal Dealers Act 2013 says that an application must be accompanied by the fee. It does not offer provision for a fee to be collected in two parts to distinguish between processing an application and managing the licensing system. Therefore, any fee which we collect as a licensing authority may only include the cost of the application process. This may change depending on the outcome of the referral to the European Court of Justice next year.

6. Enforcement

- 6.1 Due to our inability to charge for enforcement against unlicensed scrap metal dealers or collectors it has only been possible to check whether licence holders are compliant with their licence conditions. Enforcement action against unlicensed scrap metal dealers can only be taken by the Police.

- 6.2 Licensing officers work closely with West Midlands Police to support its enforcement activity. The Police have organised a series of seven 'scrap metal action days' in Birmingham between May 2015 and June 2015. These have included joint visits between police and licensing officers to domestic properties being used as scrap metal collection sites. Since the Act was introduced there has been a noticeable reduction in the number of mobile collectors on the streets of Birmingham. West Midlands Police report a reduction of 40% in scrap metal theft in the year to March 2015 and a 77% reduction since 2012.
- 6.3 To enable more concerted action and to cover the cost of enforcement against unlicensed collectors, officers propose to use reserves from Proceeds of Crime Act investigations conducted by the Trading Standards Service to fund the cost of enforcement exercises against any unlicensed traders that are discovered.

7. Consultation

- 7.1 The authority to approve the use of Proceeds of Crime reserves for scrap metal dealer enforcement rests with the Committee. Consequently no external consultation has taken place.

8. Implications for Resources

- 8.1 Fee setting under the Scrap Metal dealers Act 2013 is a function of the Executive of the City Council, not the regulatory committee. The fees levied for applications have been calculated to ensure full cost recovery for the entire process of administering licences and checking compliance.
- 8.2 The cost of enforcement against unlicensed collectors may not be funded from licences granted under the Scrap Metal Dealers Act 2013.
- 8.3 It is proposed to utilise £10,000 of funds from the Licensing and Public Protection Proceeds of Crime budget to fund a number of enforcement exercise during 2015/2016.

9. Implications for Policy Priorities

- 9.1 The contents of this report contribute to the priority action of ensuring business compliance with legislation to protect the economic interests of consumers and businesses as contained in the Council Business Plan 2015+.
- 9.2 The Licensing Service has a key role to play with regard to the continued reduction in metal theft and the City Council's commitment to community safety and crime reduction.

10. Implications for Equality and Diversity

- 10.1 A large number of Birmingham's current holders of registrations under the SMDA 1964, particularly mobile collectors, reside within the City, but emanate from other European Union countries. In discharging its requirement to assess the 'suitability of applicants' it has been necessary for the City Council to require applicants to provide criminal records disclosure certificates from both their country of origin and from Disclosure Scotland. This has provided greater difficulties for none UK nationals in producing the necessary paperwork to secure a licence to operate.

SERVICE DIRECTOR REGULATION AND ENFORCEMENT

Background Papers: nil