

**BUSINESS FRANCHISE LICENCES (TOBACCO)
AMENDMENT ACT 1989 No. 81**

NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
2. Commencement
3. Amendment of Business Franchise Licences (Tobacco) Act 1987 No. 93

SCHEDULE 1—AMENDMENTS

**BUSINESS FRANCHISE LICENCES (TOBACCO) AMENDMENT
ACT 1989 No. 81**

NEW SOUTH WALES



Act No. 81, 1989

An Act to amend the Business Franchise Licences (Tobacco) Act 1987 to make further provision in relation to the enforcement of that Act, appeals and recovery of licence fees; and for other purposes. [Assented to 2 June 1989]

See also Business Franchise Licences (Petroleum Products) Amendment Act 1989, Revenue Laws (Reciprocal Powers) Further Amendment Act 1989.

Business Franchise Licences (Tobacco) Amendment 1989

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Business Franchise Licences (Tobacco) Amendment Act 1989.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Amendment of Business Franchise Licences (Tobacco) Act 1987 No. 93

3. The Business Franchise Licences (Tobacco) Act 1987 is amended as set out in Schedule 1.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

(1) Section 3 (**Interpretation**)—

Section 3 (4)—

Omit the subsection, insert instead:

(4) A sale of tobacco made outside New South Wales in the course of tobacco wholesaling or tobacco retailing shall for the purposes of this Act be regarded as having been made in New South Wales if the terms (whether express or implied) of the sale or of any contract for the sale—

- (a) require either party to deliver, or arrange delivery of, the tobacco into or within New South Wales; or
- (b) contemplate delivery of the tobacco into or within New South Wales.

(2) Section 6 (**Application of Act to intrastate trade**)—

Section 6 (2)—

Omit the subsection, insert instead:

(2) Nothing in this section affects the operation of section 31 of the Interpretation Act 1987.

(3) Section 27A—

Before section 28, insert:

Expanded meaning of “sell”

27A. In this Part—

“sell” includes the following:

- (a) barter and exchange;

Business Franchise Licences (Tobacco) Amendment 1989

SCHEDULE 1—AMENDMENTS—*continued*

- (b) deal in, agree to sell, or offer or expose for sale;
- (c) have in possession, custody or control for sale;
- (d) send, forward, deliver or receive for sale or on sale;
- (e) authorise, direct, cause, suffer, permit or attempt any of those acts or things.

(4) Section 33—

Omit the section, insert instead:

Possession of commercial quantities—presumptions

33. If tobacco in a quantity that exceeds the prescribed quantity is in a person's possession, custody or control, it shall be presumed in any proceedings for an offence under this Part, unless the court is satisfied to the contrary—

- (a) that the tobacco is in the person's possession, custody or control for sale; and
- (b) that the person is carrying on tobacco wholesaling.

(5) Section 37A—

After section 37, insert:

Change of particulars to be notified

37A. If a change occurs in any of the particulars referred to in section 37 in respect of a licence, the licensee shall, within 7 days after the change occurs, notify the Chief Commissioner in writing giving details of the change.

Penalty: \$2,000.

(6) Section 40—

Omit the section, insert instead:

Renewal of licence

40. (1) If, on or before the expiry of a licence, the licensee pays to the Chief Commissioner the fee payable for a further licence, the licensee—

- (a) shall be taken to have applied for a further such licence; and
- (b) shall be taken to have been granted the licence, with effect from the expiration of the person's current licence.

(2) If the fee payable for a further licence is paid after the expiry of a licence, the Chief Commissioner may direct in writing that the payment be accepted and regarded as having been made immediately before the expiry of the licence concerned.

(3) The Chief Commissioner's direction has effect accordingly.

*Business Franchise Licences (Tobacco) Amendment 1989*SCHEDULE 1—AMENDMENTS—*continued*

(4) The Chief Commissioner may demand and receive an amount by way of a penalty (but not more than twice the fee payable for the further licence) as a condition precedent to giving a direction under subsection (2).

(5) This section does not prevent—

- (a) the cancellation or surrender of a licence under another provision of this Act; or
- (b) the operation of section 47 or 48 in relation to a person if the Chief Commissioner decides not to act under this section in relation to the person.

(7) Part 6, Division 1, heading:

Before section 51, insert:

Division 1—Licences

(8) Part 6, Division 2—

Omit sections 52–54, insert instead:

Division 2—Fee assessments

Objection to assessment

52. (1) A person who is dissatisfied with an assessment under this Act may within 60 days after the issue of the notice of assessment object to the assessment.

(2) An objection is made by lodging with the Chief Commissioner a statement in writing specifying fully and in detail the grounds of the objection.

Applications for extension of time

53. (1) A person may apply to the Chief Commissioner for an extension of the time for lodging an objection and may do so even though the time for lodging an objection has expired.

(2) The application must be in writing and be lodged with the Chief Commissioner.

(3) The Chief Commissioner shall consider the application and may grant it for reasonable cause shown or may refuse it.

(4) If dissatisfied with the Chief Commissioner's decision on the application, the person may apply to the Tribunal for the extension of time and the Tribunal may grant it for reasonable cause shown or may refuse it.

(5) Such an application to the Tribunal shall be made, heard and determined in the prescribed manner.

Business Franchise Licences (Tobacco) Amendment 1989

SCHEDULE 1—AMENDMENTS—*continued*

Determination of objection

54. (1) The Chief Commissioner shall consider any objection and may—

- (a) allow the objection wholly or in part and appropriately modify the assessment to which it relates by way of a reassessment under section 46; or
- (b) disallow the objection and confirm the assessment to which it relates.

(2) When a decision is made on an objection, the Chief Commissioner shall inform the objector in writing of the decision and the reasons for the decision.

(3) To the extent that an objection is determined in favour of the objector, the Chief Commissioner shall refund the amount of any overpayment of the licence fee.

Appeal etc. against decision on objection

54A. (1) An objector dissatisfied with the decision of the Chief Commissioner on an objection—

- (a) may request the Chief Commissioner to refer the decision to the Tribunal for review; or
- (b) may request the Chief Commissioner to approve in writing of an appeal by the objector to the Supreme Court against the decision.

(2) Such a request must be in writing and be lodged with the Chief Commissioner within 30 days (or such longer period as the Chief Commissioner may allow for reasonable cause shown) after the objector is informed under section 54 of the Chief Commissioner's decision on the objection.

(3) If the Chief Commissioner does not comply with a request under subsection (1) (a) or (b) within 60 days after it is made and the objector—

- (a) has provided the Chief Commissioner with any information required by the Chief Commissioner in relation to the assessment concerned; and
- (b) lodges with the Chief Commissioner a notice in writing requiring the Chief Commissioner to comply with the request,

the Chief Commissioner shall comply with the request not later than 30 days after the notice is lodged.

(4) The objector may appeal to the Supreme Court against the decision within 14 days after the Chief Commissioner grants approval under this section to the appeal.

SCHEDULE 1—AMENDMENTS—*continued***Review by Tribunal**

54B. (1) A review by the Tribunal shall be heard and determined in the prescribed manner.

(2) When the Tribunal makes its decision, it shall inform the objector in writing of the decision and the reasons for the decision.

(3) The parties to a review before the Tribunal shall each bear their own costs.

Appeal from decision of Tribunal

54C. If dissatisfied with the decision of the Tribunal, the objector or the Chief Commissioner may appeal to the Supreme Court within 60 days (or such longer period as the Tribunal may allow for reasonable cause shown) after being informed of the decision.

Nature of review and appeal

54D. (1) A review by the Tribunal or an appeal to the Supreme Court under this Division is by way of rehearing of the original objection to the Chief Commissioner and is limited to the grounds of the original objection.

(2) On giving its decision, the Tribunal or the Court may determine the amount of any fee payable as a result of the decision (including any additional or penalty fee).

(3) Part 5 applies to the Tribunal's or the Court's assessment of a fee in the same way as that Part applies to the assessment of a fee by the Chief Commissioner.

Onus on objector

54E. On an objection, review or appeal under this Division, the objector concerned bears the onus of establishing on the balance of probabilities that the licence fee in question was incorrectly assessed.

Payment of fee assessed by Tribunal or Supreme Court

54F. (1) If the fee assessed by the Tribunal or the Supreme Court under this Division—

- (a) is greater than the amount paid by the objector, the objector is liable to pay the difference; or
- (b) is less than the amount paid by the objector, the Chief Commissioner shall refund the difference to the objector, together with interest at the prescribed rate.

(2) Interest payable under subsection (1) (b) is payable from the date on which the amount concerned was paid by the objector until the date it is refunded.

*Business Franchise Licences (Tobacco) Amendment 1989*SCHEDULE 1—AMENDMENTS—*continued***Liability not affected by objection etc.**

54G. (1) Except to the extent otherwise permitted by the Chief Commissioner, the lodging of an objection, the referral of an objection to the Tribunal or an appeal to the Supreme Court does not affect any liability of an objector to pay a fee in accordance with this Act.

(2) A permission under subsection (1) must be in writing.

Lodgment with Chief Commissioner

54H. For the purposes of this Division, something is lodged with the Chief Commissioner by being addressed to the Chief Commissioner and lodged at or sent by post to any office of the Chief Commissioner.

Assessment includes reassessment

54I. In this Division, “assessment” includes reassessment, but the right of a person to object against a reassessment is limited to a right to object against the particular alterations or additions made as a result of the reassessment.

(9) Section 58 (Seizure of tobacco)—

Section 58 (3)—

Omit the subsection.

(10) Section 58A—

After section 58, insert:

Tobacco in custody under Part 8 may be treated as seized tobacco

58A. (1) If the Chief Commissioner reasonably believes that tobacco in custody under Part 8 (or the liquidated value of which has been paid into Court under that Part) is (or was at the time it was taken into custody) evidence of an offence by any person, the Chief Commissioner may—

(a) decide to treat that tobacco as having been taken into custody under section 58; and

(b) issue a certificate to that effect.

(2) If the Chief Commissioner does so—

(a) the tobacco concerned shall be regarded as having been taken into custody under section 58; and

(b) any amount paid into Court in respect of it under section 65G shall be regarded as having been paid into Court under section 59.

*Business Franchise Licences (Tobacco) Amendment 1989*SCHEDULE 1—AMENDMENTS—*continued*

(3) If the Chief Commissioner knows of the whereabouts of the person to whom a receipt was tendered under section 64 (4) (a) in respect of the tobacco concerned, the Chief Commissioner shall give notice to that person of the action taken under this section.

(11) Section 59 (**Realisation of value of seized tobacco**)—

Section 59 (5)—

Omit “If, at the hearing of the application, evidence is given that the tobacco was in the possession of a person for sale in the course of carrying on a business of tobacco wholesaling or retailing, the Court”, insert instead “On an application under this section, the Court”.

(12) Section 60 (**Forfeiture of tobacco**)—

(a) Section 60 (1) (a) (i)—

Omit “the offence”, insert instead “an offence under Part 4”.

(b) Section 60 (1) (a) (ii)—

After “possession”, insert “, custody or control”.

(13) Section 62 (**Return of tobacco by Chief Commissioner**)—

Section 62 (2)—

At the end of section 62, insert:

(2) No proceedings shall be taken against the Chief Commissioner as a consequence of the return of any tobacco in accordance with this section.

(14) Part 8, Division 1, heading—

Before section 63, insert:

Division 1—Duties etc. of transporters(15) Section 63 (**Transportation records**)—

(a) Section 63 (2)—

After “The record shall”, insert “be in writing and”.

(b) Section 63 (2) (b1)—

After section 63 (2) (b), insert:

(b1) the name and address of the person who owns the tobacco;

(c) Section 63 (2) (f)—

Omit the paragraph, insert instead:

(f) the name and address of the person (if any) who has agreed to purchase the tobacco

Business Franchise Licences (Tobacco) Amendment 1989

SCHEDULE 1—AMENDMENTS—*continued*

- (d) Section 63 (5)—
Omit the subsection.
- (e) Section 63 (6)—
After “produce a record,”, insert “fails to produce a record or”.
- (f) Section 63 (6)—
Omit “\$1,000”, insert instead “\$2,000”.
- (16) Section 64 (**Temporary custody**)—
- (a) Section 64 (1) (a)—
Omit the paragraph, insert instead:
(a) does not produce a record referred to in section 63 as required under that section; or
- (b) Section 64 (1) (b)—
Omit “or furnishes particulars”.
- (17) Section 65—
Omit the section, insert instead:
Tobacco in custody dealt with under Division 2
65. Tobacco taken into custody under section 64 shall be retained in custody and shall be dealt with in accordance with Division 2.
- (18) Part 8, Division 2—
After section 65, insert:
Division 2—Forfeiture of tobacco in custody
Definition and application
65A. (1) In this Division—
“seized tobacco” means tobacco taken into custody under section 64.
(2) This Division ceases to apply to tobacco (or its liquidated value paid into Court) if a certificate under section 58A (tobacco evidence of offence) is issued in respect of the tobacco.
Chief Commissioner to invite claims for seized tobacco
65B. (1) Within 21 days after tobacco is taken into custody under Division 1, the Chief Commissioner shall publish a notice in relation to the tobacco in a newspaper circulating generally in the State.

Business Franchise Licences (Tobacco) Amendment 1989

SCHEDULE 1—AMENDMENTS—*continued*

(2) The notice shall invite any person who claims to be entitled to the tobacco to make a claim for it by a date specified in the notice, being a date not less than 30 days after publication of the notice.

(3) To be considered as having been duly made, the claim—

- (a) must be in writing; and
- (b) must be made by being lodged at or sent by post to any office of the Chief Commissioner; and
- (c) must be received by the Chief Commissioner by the required date specified in the notice.

(4) The notice inviting claims must also draw attention to the duty of a claimant under section 65C (transportation record).

Claimant must lodge transportation record

65C. (1) A person who makes a claim for seized tobacco must furnish to the Chief Commissioner a correct record containing the particulars specified in section 63 (2) (as applicable to the particular tobacco claimed when it was taken into custody).

(2) If the claimant does not furnish the record, the Chief Commissioner may refuse to consider the claim and may reject it.

(3) If the Chief Commissioner rejects a claim under this section, the Chief Commissioner shall inform the claimant in writing.

Request for particulars etc. from claimant

65D. (1) If a claim for seized tobacco is duly made, the Chief Commissioner may request the claimant in writing to do either or both of the following things within a specified period of not less than 14 days:

- (a) to produce to the Chief Commissioner for inspection any records and documents in the custody or under the control of the claimant relating to the purchase of the tobacco by the claimant;
- (b) to produce a statement in writing in the English language setting out details of the source of funds or finance, and the mode of payment, used or proposed to be used in the purchase of the tobacco by the claimant.

(2) The provisions of section 55 (3)–(5) apply to any such records, documents and statements in the same way as those provisions apply to records, statements and documents under that section.

*Business Franchise Licences (Tobacco) Amendment 1989***SCHEDULE 1—AMENDMENTS—*continued***

(3) This section does not affect the operation of section 55 (access to premises, records etc.).

Decision on claim

65E. (1) If a claim for seized tobacco is duly made, the Chief Commissioner shall (unless the claim has been rejected under section 65C) consider the claim and may decide—

- (a) to accept the claim wholly or in part; or
- (b) to reject the claim.

(2) When a decision is made on a claim, the Chief Commissioner shall inform the claimant in writing of the decision and the reasons for the decision.

(3) The Chief Commissioner may deliver seized tobacco to a person to the extent that the person's claim is accepted by the Chief Commissioner.

Chief Commissioner may seek declaration

65F. The Chief Commissioner may seek an appropriate declaration from the Supreme Court to assist the Chief Commissioner in making a decision under section 65E.

Realisation of value of seized tobacco when claims rejected

65G. (1) If the Chief Commissioner has rejected all claims duly made for particular seized tobacco, the Chief Commissioner may, if the Chief Commissioner thinks it appropriate to do so in the circumstances of the case, apply to the Supreme Court for an order under this section for disposal of the tobacco.

(2) The Court may, if it thinks fit, require the Chief Commissioner to give notice of the application to a person who the Court has reason to believe has an interest in the tobacco concerned.

(3) A person who has duly made a claim in respect of the tobacco concerned is entitled to appear and to adduce evidence at the hearing of the application.

(4) On an application under this section, the Court—

- (a) may, by order, empower the Chief Commissioner to sell the tobacco in such manner and subject to such directions, if any, as the Court may specify, and to pay the proceeds of sale into Court; or
- (b) at the request of any person appearing to the Court to have an interest in the tobacco, may—
 - (i) fix the value of the person's interest in the tobacco for the purposes of an order under subparagraph (ii); and

SCHEDULE 1—AMENDMENTS—continued

- (ii) order the Chief Commissioner, on payment into Court by that person of an amount equal to the value of the interest so fixed, to deliver tobacco, having a value equal to that amount, to that person.

Application to Supreme Court by dissatisfied claimant

65H. (1) If a claim is duly made for seized tobacco and—

- (a) the claimant is dissatisfied with the Chief Commissioner's decision on the claim; or
- (b) the Chief Commissioner has not given a decision on the claim within 1 month after it was made,

the claimant may apply to the Supreme Court for an order as to whether the claimant is entitled to the tobacco concerned (or the liquidated value of the tobacco paid into Court).

(2) The application to the Court may be made only—

- (a) within 2 months after the claimant is notified by the Chief Commissioner of the decision on the claim; or
- (b) if the Chief Commissioner has not given a decision on the claim within 1 month after the claim was made—within 3 months after the claim was made.

(3) If more than one application is made to the Court under this section in relation to particular tobacco or money, the applications shall be heard and determined together unless the Court otherwise orders.

Chief Commissioner may appear etc. on application

65I. (1) The Chief Commissioner is entitled to appear and adduce evidence at the hearing of an application to the Supreme Court under section 65H.

(2) Without limiting the evidence that may be adduced by the Chief Commissioner, the Chief Commissioner—

- (a) may adduce evidence that the applicant failed to comply with a request under section 65D and the Court is entitled to draw such inferences from the failure as appear to be warranted in the circumstances; and
- (b) may adduce evidence of the contents of any records, documents and statements produced by the claimant under that section.

Grounds on which application must be dismissed

65J. (1) On the application of the Chief Commissioner, the Supreme Court shall dismiss a claimant's application under section 65H if the Court is satisfied that—

- (a) the claimant has failed to furnish to the Chief Commissioner the record required by section 65C; or

*Business Franchise Licences (Tobacco) Amendment 1989*SCHEDULE 1—AMENDMENTS—*continued*

(b) the claimant has failed to prosecute the application with all due diligence.

(2) If the Chief Commissioner makes application as referred to in subsection (1) (a), the claimant bears the onus of satisfying the Court that the claimant has furnished to the Chief Commissioner the record required by section 65c.

Forfeiture etc. of seized tobacco

65k. (1) The Chief Commissioner may order that seized tobacco be forfeited to the Crown if satisfied that—

- (a) no claim for the seized tobacco has been duly made; or
- (b) all claims duly made for the seized tobacco have been unsuccessful.

(2) A claim for seized tobacco shall be regarded as being unsuccessful if—

- (a) the Chief Commissioner has rejected the claim; and
- (b) any application to the Supreme Court by the claimant under section 65H in respect of the claim has been disposed of; and
- (c) the Supreme Court has not ordered on such an application that a person is entitled to the tobacco.

(3) An order that tobacco be forfeited to the Crown must be published in the Gazette and operates, on its publication, to forfeit the tobacco to the Crown but may be revoked by the Chief Commissioner by a further order in writing.

(4) A reference in this section to seized tobacco includes a reference to the liquidated value of seized tobacco paid into Court under section 65G, in which case the Chief Commissioner's order is sufficient authority for the payment of that liquidated value out of Court to the Crown.

Power to dispose of forfeited tobacco

65L. The Chief Commissioner may dispose of forfeited tobacco on behalf of the Crown in such manner as the Chief Commissioner thinks fit, including by destroying it.

No action against Chief Commissioner

65M. No proceedings shall be taken against the Chief Commissioner as a consequence of—

- (a) the release of any tobacco (or its liquidated value paid into Court) to a person; or
- (b) the forfeiture of any tobacco (or its liquidated value paid into Court); or

*Business Franchise Licences (Tobacco) Amendment 1989*SCHEDULE 1—AMENDMENTS—*continued*

(c) the destruction of any tobacco,
in accordance with this Division.

Extension of time by Chief Commissioner

65N. The Chief Commissioner may extend and further extend the time for making a claim for seized tobacco or an application to the Supreme Court under this Division.

(19) Section 74 (**Evidence of matters certified**)—

Omit “under this Act or the regulations”.

(20) Section 75 (**Notices of assessment**)—

Section 75 (1)—

Omit “In any proceedings under this Act or the regulations or for the recovery of any amount due and payable under this Act or the regulations”, insert instead “In any proceedings”.

(21) Section 76A—

After section 76, insert:

Alternative verdict—Part 4

76A. If in proceedings against a person for an offence under Part 4 the court is not satisfied that the person contravened the provision concerned but is satisfied that the act or omission concerned constituted a contravention by the person of another provision of Part 4, the court may convict the person of an offence under that other provision.

(22) Section 79A—

After section 79, insert:

Set off by Chief Commissioner

79A. (1) If a person has a liability under this Act to pay an amount to the Chief Commissioner and the Chief Commissioner also has a liability under this Act to pay an amount to the person—

- (a) the Chief Commissioner may, instead of paying the person, pay an amount in discharge of the person’s liability under this Act; and
- (b) to the extent of any such payment by the Chief Commissioner, the Chief Commissioner’s liability to the person, and the person’s liability under this Act, are discharged.

*Business Franchise Licences (Tobacco) Amendment 1989***SCHEDULE 1—AMENDMENTS—continued**

(2) A reference in subsection (1) to a liability under this Act is a reference to a liability under, by virtue of or in connection with the administration of this Act or the Business Franchise Licences (Tobacco) Act 1975 (whether by way of licence fees, interest, penalties, refunds, judgment debts or costs, or otherwise).

(3) This section does not affect any other right of the Chief Commissioner to set off.

(23) Schedule 3 (Savings and transitional provisions)—

Clauses 9, 10—

After clause 8, insert:

*Business Franchise Licences (Tobacco) Amendment Act 1989***Tobacco in custody**

9. (1) Part 8, as amended by the Business Franchise Licences (Tobacco) Amendment Act 1989, applies to tobacco taken into custody under that Part whether before or after the commencement of section 65B.

(2) For the purposes of the application of that Part (as so amended) to any such tobacco, the tobacco shall be regarded as having been taken into custody on the commencement of section 65B.

Pending objections

10. (1) In this clause—

“former appeal provisions” means the provisions of Part 6 as in force immediately before the commencement of section 54A;

“new appeal provisions” means the provisions of Part 6, as amended by the Business Franchise Licences (Tobacco) Amendment Act 1989.

(2) An objection made under the former appeal provisions before the commencement of the new appeal provisions shall be dealt with as an objection under the new appeal provisions unless subclause (3) otherwise provides.

Business Franchise Licences (Tobacco) Amendment 1989

SCHEDULE 1—AMENDMENTS—*continued*

(3) Subclause (2) does not apply to an objection made under the former appeal provisions if an appeal to the Tribunal in respect of the objection has been made and determined before, or is out of time on, the commencement of the new appeal provisions.

[*Minister's second reading speech made in—
Legislative Assembly on 3 May 1989
Legislative Council on 23 May 1989*]