

Act No. 93

## **BUSINESS FRANCHISE LICENCES (TOBACCO) BILL 1987\***

NEW SOUTH WALES



### **EXPLANATORY NOTE**

**(This Explanatory Note relates to this Bill as introduced into Parliament)**

The Business Franchise Licences (Petroleum Products) Bill 1987 is cognate with this Bill.

The object of this Bill is to provide for the licensing of persons carrying on the business of selling tobacco.

The proposed Act will replace the Business Franchise Licences (Tobacco) Act 1975.

---

#### **PART 1—PRELIMINARY**

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides that the proposed Act will, with minor exceptions, commence on a day to be appointed by the Governor-in-Council.

Clause 3 defines certain terms used in the Bill, in particular “tobacco retailing” and “tobacco wholesaling”, which are the two activities to be licensed. The definition of “prescribed quantity” (of tobacco) has relevance in relation to evidence of dealing in commercial quantities; the definition of “relevant period” relates to the licence fee structure contained in Part 5.

Clause 4 provides that tobacco retailing by a wholesaler is to be counted as tobacco wholesaling. (This allows a trader engaged in both wholesaling and retailing to carry on business with one licence rather than two).

Clause 5 provides that the proposed Act is to bind the Crown.

---

\* Amended in committee—see table at end of volume.

*Business Franchise Licences (Tobacco) 1987*

---

Clause 6 provides for the proposed Act to be read down (so as to apply only to intrastate tobacco trading), in the event that it is found to be beyond the competence of Parliament to enact this Bill in so far as it purports to apply to interstate trade.

PART 2—MERCANTILE GROUPS

DIVISION 1—*Constitution of groups*

Clause 7 states the fundamental condition of membership of a group for the purposes of the proposed Act. A person is a group member if the person meets any of the criteria of membership set out in Division 1 of Part 2, unless the Chief Commissioner of Business Franchise Licences (Tobacco) determines that the person is not such a member.

Clause 8 provides for notice to be given of a determination of the Chief Commissioner under proposed section 7 or of the revocation of such a determination.

Clause 9 provides that corporations which, within the meaning of the Companies Code, are related corporations, form a group.

Clause 10 constitutes certain groups in terms of the employment relationship of employees.

Clause 11 constitutes certain groups by virtue of a person's controlling interest in two businesses.

Clause 12 consolidates any groups with overlapping membership into one group.

DIVISION 2—*Controlling interests*

This Division states, in relation to several kinds of businesses, criteria sufficient for the existence of a "controlling interest" referred to in clause 11. The kinds of businesses considered are—

- (a) corporate businesses (clause 13);
- (b) related corporate businesses (clause 14);
- (c) partnership businesses (clause 15);
- (d) businesses owned by sole traders (clause 16);
- (e) businesses owned by trustees (clause 17); and
- (f) businesses carried on under a trust (clause 18).

In addition, provision is made for the existence of a controlling interest—

- (a) arising from ownership of a business whose managers control some other business (clause 19); or
- (b) (as provided by clause 20) arising from—
  - (i) the entitlements of beneficiaries under a trust; or
  - (ii) the potential entitlements of persons eligible to be beneficiaries under a power in the nature of a discretionary trust.

*Business Franchise Licences (Tobacco) 1987*

---

PART 3—ADMINISTRATION

Clause 21 creates the office of Chief Commissioner for Business Franchise Licences (Tobacco). The office is held by the permanent head for the time being of the Department of Finance.

Clause 22 creates the office of Deputy Chief Commissioner for Business Franchise Licences (Tobacco). The office is held by the deputy permanent head for the time being of the Department of Finance.

Clause 23 creates the office of Commissioner for Business Franchise Licences (Tobacco).

Clause 24 enables staff to be employed for the administration of the proposed Act.

Clause 25 enables delegation of the Chief Commissioner's functions.

Clause 26 constitutes a Business Franchise Licence Fees (Tobacco) Appeals Tribunal.

Clause 27 provides the Chief Commissioner and others with immunity from suit in respect of things done in good faith in the execution of the proposed Act.

PART 4—OFFENCES RELATING TO THE SALE OF TOBACCO

Clause 28 prohibits the sale of tobacco without a licence.

Clause 29 prohibits (with specified exceptions) tobacco wholesaling without a wholesaler's licence or group wholesaler's licence.

Clause 30 prohibits tobacco retailing without a retailer's licence or group retailer's licence.

Clause 31 prohibits the sale of tobacco (otherwise than through a vending machine) on premises other than licensed premises.

Clause 32 requires that there be displayed, on a tobacco vending machine, particulars of the licence under which sales through that machine are carried on.

Clause 33 creates a presumption that tobacco in a quantity exceeding the prescribed quantity is for sale.

PART 5—LICENCES

Clause 34 describes the kinds of licences that may be granted under the proposed Act, and what each licence authorises.

Clause 35 states who may apply for a licence of each kind.

Clause 36 provides for the issue of licences.

Clause 37 sets out the particulars to be furnished to the Chief Commissioner by an applicant for a licence.

Clause 38 provides for the endorsement (and amendment, as required) on a licence of the premises at which the activity authorised by the licence is to be carried on.

*Business Franchise Licences (Tobacco) 1987*

---

Clause 39 specifies the duration of a licence.

Clause 40 provides for the automatic renewal of licences.

Clause 41 provides the basis of assessment of fees payable for licences. Essentially, the fee is ad valorem of receipts from tobacco sales during the "relevant period" applicable to the licence.

Clause 42 states the effect, in relation to assessment of a licence fee, of certain changes in circumstances of the applicant. The changes contemplated are—

- (a) the applicant was a member of a group during the relevant period for the licence, but ceased to be such a member before the licence was issued; or
- (b) the applicant was a member of one group during the relevant period, but became a member of a different group before the licence was issued.

Clause 43 enables the Chief Commissioner to assess the fee payable by an applicant for a licence who did not trade during the whole or part of the relevant period or in a case where adequate data is not available in relation to the applicant's trading receipts during the relevant period.

Clause 44 provides for a refund of a licence fee paid in respect of the receipts from certain sales of tobacco to interstate purchasers.

Clause 45 empowers the Minister to determine the value, for the purposes of the proposed Act, of tobacco.

Clause 46 provides for reassessment of a fee originally assessed incorrectly.

Clause 47 empowers the Chief Commissioner to assess and recover fees from traders who ought to have had, but did not have, a licence at the time they carried on business.

Clause 48 requires the payment of interest if a payment owing to the Chief Commissioner as the result of a reassessment, or of an assessment under proposed section 47, is not paid in due time.

Clause 49 requires the surrender of a licence by a trader who has ceased to trade under its authority.

Clause 50 enables the cancellation of the licence held by a person who is convicted of selling tobacco to a child.

**PART 6—APPEALS AND OBJECTIONS**

Clause 51 affords a right of appeal to an applicant for a licence to whom a licence has not been granted.

Clause 52 enables a person who disagrees with the Chief Commissioner's assessment (or reassessment) of the person's licence fee to lodge a formal objection to the assessment.

Clause 53 enables a person dissatisfied with the Chief Commissioner's determination on an objection to appeal to the Tribunal.

Clause 54 provides that the onus of proof regarding the correctness of an assessment rests with the person lodging an objection or appeal in respect of it.

*Business Franchise Licences (Tobacco) 1987*

---

PART 7—ENFORCEMENT POWERS

Clause 55 empowers the Chief Commissioner or an inspector, for the purposes of the proposed Act, to enter premises (other than a dwelling), inspect and copy records and documents and require statements to be produced and questions to be answered.

Clause 56 enables the issue of a search warrant authorising the Chief Commissioner or an inspector to enter premises.

Clause 57 empowers the Chief Commissioner to require a person to furnish information, or to attend and give evidence before the Chief Commissioner or an authorised officer, concerning dealings in tobacco.

Clause 58 empowers the Chief Commissioner to seize tobacco reasonably believed to be evidence of an offence.

Clause 59 provides for the conversion into money of tobacco that has been seized by the Chief Commissioner.

Clause 60 provides for forfeiture to the Crown of tobacco kept by a person for the purposes of an offence of which the person is guilty.

Clause 61 allows the owner of tobacco that has been seized by the Chief Commissioner to approach the Supreme Court for an order releasing the tobacco.

Clause 62 makes it clear that the Chief Commissioner may return tobacco that has been seized (if, for example, proceedings for the suspected offence in connection with which it was seized are not to be instituted).

PART 8—TRANSPORTATION OF TOBACCO

Clause 63—

- (a) requires a record of certain particulars to be carried by a person transporting tobacco in New South Wales by road vehicle; and
- (b) empowers the Chief Commissioner or an inspector to require production, by the driver of a vehicle carrying tobacco, of the record.

Clause 64 empowers the Chief Commissioner to take custody of any tobacco in respect of which no transportation record, or no apparently correct transportation record, has been produced by the driver of the vehicle transporting it.

Clause 65 describes what may happen after any tobacco has been taken into custody under proposed section 64. The Chief Commissioner is to release the tobacco on production of the transportation record. If the record is not produced within 6 months, the tobacco may be destroyed.

PART 9—MISCELLANEOUS

Clause 66 requires a person who sells tobacco to keep and retain such records as the regulations may prescribe.

*Business Franchise Licences (Tobacco) 1987*

---

Clause 67 requires invoices relating to the sale of tobacco by a wholesaler to bear the licence number of the vendor.

Clause 68 prohibits the endorsement, on an invoice, of particulars appearing to be those required by proposed section 67 if in fact they are not.

Clause 69 prohibits (with certain specified exceptions) the disclosure, by a person employed in connection with the administration or execution of the proposed Act or its regulations, of information obtained in the course of that employment.

Clause 70 prohibits the furnishing of false or misleading information to the Chief Commissioner or an inspector.

Clause 71 denies a person the right to refuse to answer a question put to the person by or on behalf of the Chief Commissioner, but provides that the person's answer is not admissible in criminal proceedings other than proceedings for an offence of answering falsely (or proceedings for perjury, if the answer is a sworn statement).

Clause 72 provides that a corporation is bound by information supplied by officers of the corporation, unless it is established that the information was provided without due authorisation.

Clause 73 prohibits the obstruction of the Chief Commissioner or inspectors in the exercise of their functions.

Clause 74 provides for the admissibility in evidence of certain matters given in a certificate of the Chief Commissioner. The certificate is prima facie evidence of the matters certified.

Clause 75 provides for the admissibility in evidence of a notice of assessment of a licence fee. The notice is conclusive as to its contents except in proceedings to review the assessment, in which case it is prima facie evidence only.

Clause 76 provides for offences against the proposed Act or its regulations to be dealt with summarily by the Supreme Court or a Local Court.

Clause 77 provides that proceedings for an offence may be taken by the Chief Commissioner or an authorised officer.

Clause 78 empowers the Chief Commissioner to recover, as a debt, money payable to the Chief Commissioner under the proposed Act or the regulations.

Clause 79 empowers the Chief Commissioner to obtain money from the debtors of a person who owes money to the Chief Commissioner under the proposed Act.

Clause 80 authorises members of the police force to provide assistance to the Chief Commissioner or other officers in the exercise of the functions of the Chief Commissioner.

Clause 81 makes directors and managers of a corporation responsible for offences committed by the corporation with their authority or permission.

Clause 82 provides for service of notices and other documents for the purposes of the proposed Act.

*Business Franchise Licences (Tobacco) 1987*

---

Clause 83 authorises the Governor-in-Council to make regulations in aid of the proposed Act.

Clause 84 amends the Search Warrants Act 1985 as a consequence of the enactment of proposed section 56.

Clause 85 effects the repeal of the Business Franchise Licences (Tobacco) Act 1975 and enactments amending that Act.

Clause 86 gives effect to Schedule 3 to the proposed Act.

**SCHEDULE 1—THE TRIBUNAL**

This Schedule enacts provisions relating to the person appointed as the Tribunal constituted by proposed section 26.

**SCHEDULE 2—REPEALS**

This Schedule lists the enactments repealed by proposed section 85.

**SCHEDULE 3—SAVINGS AND TRANSITIONAL PROVISIONS**

This Schedule enacts savings and transitional provisions in consequence of the repeals effected by proposed section 85.

---