

BUSINESS FRANCHISE (TOBACCO).

No. 22 of 1981.

AN ACT to amend the Business Franchise (Tobacco) Act 1975-1980.

[Assented to 26 May 1981.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

1. (1) This Act may be cited as the *Business Franchise (Tobacco) Amendment Act 1981*.

Short title
and
citation.

(2) In this Act, the Business Franchise (Tobacco) Act 1975-1980 is referred to as the principal Act.

Act No. 84
of 1975 as
amended by
Act No. 32
of 1980.

(3) The principal Act as amended by this Act may be cited as the Business Franchise (Tobacco) Act 1975-1981.

Section 2
amended.

2. Section 2 of the principal Act is amended—

(a) in subsection (1)—

(i) by inserting in their appropriate alphabetical positions the following definitions—

“ “corporation” has the meaning ascribed to that word by section 5 (1) of the Companies Act 1961;

“group tobacco licence” means a group tobacco licence which is in force under this Act and relates to a group of wholesale tobacco merchants, a group of retail tobacconists or a group comprising wholesale tobacco merchants and retail tobacconists;

“person” includes a corporation, a company, a body or association whether corporate or unincorporate, and a partnership;

“relevant period” in relation to a licence which if issued would expire at the end of a period specified in column 1 of Schedule 1, means the preceding period of 2 months as specified opposite that period in column 2 of Schedule 1;

“voting share” has the meaning ascribed to that expression by section 5 (1) of the Companies Act 1961; ” ;

(ii) by deleting “, 1904” in the definition of “Commissioner” and substituting the following—

“ 1978 ” ; and

(iii) by deleting the definition of “licence” and substituting the following definition—

“ “licence” means a licence issued or renewed under this Act; ” ; and

(b) by inserting after subsection (7) the following subsections—

“ (8) A reference in this Act to a holder of a group tobacco licence includes a reference to each person whose name is under section 7 (6) specified in a group tobacco licence.

(9) A reference in this Act to the issue of a licence includes a reference to the renewal of a licence.

(10) Where pursuant to a sale made outside the State tobacco is delivered in the course of intrastate trade within the State, that sale shall, for the purposes of this Act, be deemed to have been made within the State. ” .

3. After section 2 of the principal Act the following sections are inserted—

Sections
2A to 2F
inserted.

“ 2A. (1) For the purposes of this Act, a person is a member of a group of—

Membership
of a group.

- (a) wholesale tobacco merchants;
- (b) retail tobacconists; or
- (c) wholesale tobacco merchants and retail tobacconists,

if—

- (d) that person is one of the persons who constitute a group for the purposes of this Act; and
- (e) there is not in force a determination under subsection (2) or (4) by the Commissioner to the effect that such person is not a member of the group.

(2) The Commissioner may, by writing under his hand, determine that a person who would, but for the determination, be a member of a group for the purposes of this Act is not a member of the group for such purposes if he is satisfied that that person—

- (a) has continuously carried on and will continue to carry on the business of selling tobacco in the course of intra-state trade independently of the group; and
- (b) is not subject to control by any other member of the group.

(3) The Commissioner shall not make a determination under subsection (2) so as to exclude a person from a group if that person is or was on the date of the determination a corporation which, by reason of section 6 (5) of the Companies Act 1961, is to be deemed for the purposes of that Act to be related to another corporation which is a member of that group.

(4) The Commissioner may, by writing under his hand, determine that a person who would, but for the determination, be a member of a group for the purposes of this Act is not a member of any group for the purposes of this Act if he is satisfied that the person is not carrying on and has no intention of carrying on the business of selling tobacco in the course of intrastate trade.

(5) A determination made under subsection (2) or (4) shall come into force at the time when it is made and shall continue in force until it is revoked by the Commissioner and notice of the revocation has been served on the person in respect of whom the determination was made.

(6) Notice of a determination under subsection (2) or (4) shall be given by the Commissioner to the person in respect of whom

the determination was made and to every member of the group concerned who he considers is carrying on tobacco wholesaling or tobacco retailing.

(7) The Commissioner may at any time revoke a determination made under subsection (2) or (4).

(8) Notice of the revocation of a determination made under subsection (2) or (4) shall be given by the Commissioner to the person in respect of whom the determination was made and to every member of the group who he considers is carrying on tobacco wholesaling or tobacco retailing.

2B. For the purposes of this Act, 2 corporations constitute a group if they are by reason of section 6 (5) of the Companies Act 1961 to be deemed for the purposes of that Act to be related to each other.

Grouping
of corpora-
tions.

2C. For the purposes of this Act, if—

Grouping
where
employees
used in
another
business.

- (a) an employee of an employer, or 2 or more employees of an employer, perform or performs duties solely or mainly for or in connection with a business carried on by that employer and another person or other persons or by another person or other persons; or
- (b) an employer has, in respect of the employment of or the performance of duties by one or more of his employees, an agreement, arrangement, or undertaking (whether formal or informal, whether expressed or implied and whether or not the agreement, arrangement, or undertaking includes provisions in respect of the supply of goods or services or goods and services) with another person or other persons relating to a business carried on by that

other person or those other persons,
whether alone or together with another
person or other persons,

that employer and—

(c) each such other person; or

(d) both or all of those other persons,

constitute a group.

Grouping of
commonly
controlled
businesses.

2D. (1) A reference in this section to 2 businesses does not include a reference to 2 businesses both of which are owned by the same person, not being a trustee, or by the trustee or trustees of a trust.

(2) For the purposes of this Act, where the same person has, or the same persons have together, a controlling interest, as referred to in subsection (3), in each of 2 businesses, the persons who carry on those businesses constitute a group.

(3) For the purposes of subsection (2), the same person has, or the same persons have together, a controlling interest in each of 2 businesses if that person has, or those persons have together, a controlling interest under any of the following paragraphs in one of the businesses and a controlling interest under the same or another of the following paragraphs in the other business—

(a) a person has, or persons have together, a controlling interest in a business, being a business carried on by a corporation, if the directors, or a majority of the directors, or one or more of the directors, being a director or directors who is or are entitled to exercise a majority in voting power at meetings of the directors of the corporation, are or is accustomed or under an obligation, whether formal or informal, to act in accordance with the

directions, instructions, or wishes of that person or of those persons acting together;

- (b) a person has, or persons have together, a controlling interest in a business, being a business carried on by a corporation that has a share capital, if that person or those persons acting together could (whether directly or indirectly) exercise, control the exercise of, or substantially influence the exercise of, half or more than half of the voting power attached to voting shares issued by the corporation;
- (c) a person has, or persons have together, a controlling interest in a business, being a business carried on by a partnership, if that person or those persons—
 - (i) owns, or own together, (whether beneficially or not) half or more than half of the capital of the partnership; or
 - (ii) is, or are together, entitled (whether beneficially or not) to half or more than half of the profits of the partnership;
- (d) a person has, or persons have together, a controlling interest in a business, being a business carried on under a trust, if that person (whether or not as the trustee of another trust) is the beneficiary, or those persons (whether or not as the trustees of another trust) are together the beneficiaries, in respect of half or more than half of the value of the interests in the trust first-mentioned in this paragraph;
- (e) a person has a controlling interest in a business if, whether or not he is a trustee of a trust, he is the sole owner

of the business, or persons, being 2 or more trustees of a trust, have a controlling interest in a business if they are the owners of the business.

(4) Where a corporation has a controlling interest under subsection (3) in a business, it shall be deemed to have a controlling interest in any other business in which another corporation that is, by reason of section 6 (5) of the Companies Act 1961, to be deemed for the purposes of that Act to be related to it, has a controlling interest.

(5) Where—

- (a) a person has, or persons have together, a controlling interest under subsection (3) in a business; and
- (b) the person or persons who carries or carry on that business has or have such a controlling interest in another business,

the person or persons referred to in paragraph (a) of this subsection shall be deemed to have a controlling interest in the business referred to in paragraph (b) of this subsection.

(6) Where—

- (a) a person is a beneficiary under a trust;
or
- (b) 2 or more persons together are beneficiaries under a trust,

in respect of half or more than half of the value of the interests in that trust and the trustee or trustees of that trust has or have under subsection (3) a controlling interest in a business, that beneficiary or those beneficiaries shall, for the purposes of subsection (3), be deemed to have a controlling interest in that business.

2E. (1) Notwithstanding any other provision of this Act (except subsection (2)), where a person is, whether or not by virtue of this subsection, a member of 2 or more groups (each of which is in subsection (2) referred to as a smaller group), all of the members of those groups constitute, for the purposes of this Act, one group.

Smaller groups subsumed into larger groups.

(2) Except for the purpose of determining whether a group is constituted under subsection (1), a group which but for this subsection would be a smaller group ceases to be a group if its members are members of a group constituted under subsection (1).

2F. A person who, as the result of the exercise of a power or discretion by the trustee of a discretionary trust or by any other person or by that trustee and any other person, may benefit under that trust shall be deemed, for the purposes of this Act, to be a beneficiary in respect of half or more than half of the value of the interests in that trust. ” .

Beneficiaries under discretionary trusts.

4. Section 6 of the principal Act is amended—

Section 6 amended.

(a) in subsection (1), by inserting after “1976” the following—

“ and before the first day of July, 1981 ” ;

(b) by inserting after subsection (1) the following subsection—

“ (1a) A person shall not on or after the first day of July, 1981 carry on tobacco wholesaling unless he is the holder of a wholesale tobacco merchant’s licence or a group tobacco licence under this Act.

Penalty: One thousand dollars. ” ;

- (c) by repealing subsection (3) and substituting the following subsection—

“ (3) A person shall not on or after the first day of July, 1981 in the course of carrying on tobacco retailing purchase tobacco other than from the holder of a wholesale tobacco merchant’s licence or a group tobacco licence under this Act unless he is the holder of a retail tobacconist’s licence or a group tobacco licence under this Act.

Penalty: One thousand dollars. ” ;

and

- (d) by inserting after subsection (3) the following subsection—

“ (4) Subsection (3) does not apply to a person who in the course of carrying on tobacco retailing purchases tobacco solely from a retail tobacconist. ” .

Section 7
amended.

5. Section 7 of the principal Act is amended—

- (a) in subsection (1) by deleting “or a retail tobacconist’s licence” and substituting the following—

“ , a retail tobacconist’s licence or a group tobacco licence ” ;

- (b) by inserting after “applicant” in subsection (2) the following—

“ and in the case of an application for a group tobacco licence may issue a licence to each member of the group ” ;

- (c) by deleting “to the applicant” in subsection (3) and substituting the following—

“ under this Act ” ; and

- (d) by inserting after subsection (5) the following subsection—

“ (6) In the case of a group tobacco licence, the licence shall specify the name

of each person who is a member of the group on behalf of which the application for the licence was made. ” .

6. Section 8 of the principal Act is amended— Section 8
amended.

(a) in subsection (1a) by inserting in paragraph (b) after “licence” the following—

“ or a group tobacco licence ” ; and

(b) by inserting after subsection (1a) the following subsection—

“ (1b) Subsection (1a) does not apply to a person who sells tobacco in the course of intrastate trade if the sale is made in the course of tobacco retailing and is a sale of tobacco purchased in the course of intrastate trade from a retail tobacconist. ” .

7. Section 9 of the principal Act is repealed and the following section is substituted— Section 9
repealed
and substituted.

“ 9. A licence shall be in force on and from the day specified in the licence as the date for the licence to come into force (in this section referred to as the commencement date) until, unless it sooner ceases to have effect,— Duration of
licences.

(a) 27 February 1982 in the case of a wholesale tobacco merchant’s licence with a commencement date on or after 28 February 1981 but before 28 February 1982;

(b) 30 June 1981 in the case of a retail tobacconist’s licence with a commencement date on or after 1 July 1980 but before 1 July 1981;

(c) 27 February 1982 in the case of a retail tobacconist’s licence with a commencement date on or after 1 July 1981 but before 28 February 1982;

- (d) 27 February 1982 in the case of a group tobacco licence with a commencement date on or after 1 July 1981 but before 28 February 1982; and
- (e) the last day of the period of 2 months for which it is issued in the case of a wholesale tobacco merchant's licence, a retail tobacconist's licence or a group tobacco licence with a commencement date after 28 February 1982. ” .

Section 9A
inserted.

8. After section 9 of the principal Act, the following section is inserted—

Renewal of
licences.

“ 9A. (1) Subject to this section, the holder of a licence under this Act which, unless it sooner ceases to have effect, will expire after 28 February 1982 shall, not later than the 15th day of the second month for which the licence is issued, apply to the Commissioner for the renewal of the licence for a further period of 2 months.

(2) Upon receiving an application under and in accordance with subsection (1), the Commissioner may, subject to prior payment of the fee required to be paid by this Act, renew the licence for a further period of 2 months which shall expire, unless the licence otherwise ceases to have effect, on the last day of the period of 2 months for which the licence is renewed.

(3) If a licensee applies for a renewal of his licence before the licence expires and pays the fee required to be paid by this Act but the Commissioner has not renewed the licence or otherwise made a decision in respect of his application before the licence expires, the licence shall be deemed to have been renewed for such period not exceeding 2 months until the Commissioner has determined the application for renewal. ” .

9. Section 10 of the principal Act is amended—

Section 10
amended.

(a) in subsection (1)—

(i) by inserting after “1977” in subparagraph (ii) of paragraph (a) the following—

“ and ending on or before the twenty-seventh day of February, 1982 ” ;

(ii) by deleting “a fee of an amount equal to ten per centum of” in subparagraph (iii) of paragraph (b) and substituting the following—

“ and ending on or before the twenty-seventh day of February, 1982 a fee of an amount equal to ten per centum of two-thirds of ” ;

(iii) by deleting the full stop at the end of paragraph (b) and substituting the following—

“ ;

(c) for a wholesale tobacco merchant's licence which is in force for any period after the twenty-seventh day of February, 1982, a fee of twenty dollars for each wholesaler together with an amount of ten per centum of the value of tobacco sold by the applicant in the course of intrastate trading during the relevant period (other than tobacco sold to the holder of a wholesale tobacco merchant's licence or a group tobacco licence);

(d) for a group tobacco licence which is in force for any period after the twenty-seventh day of February, 1982 a fee of twenty dollars for each member of

the group together with an amount of ten per centum of the value of tobacco sold by all members of the group in the course of intrastate trading during the relevant period (other than tobacco sold to the holder of a wholesale tobacco merchant's licence or a group tobacco licence); and

- (e) for a retail tobacconist's licence which is in force for any period after the twenty-seventh day of February, 1982 a fee of an amount equal to ten per centum of the value of tobacco sold by the applicant in the course of tobacco retailing during the relevant period (other than tobacco purchased in the course of intrastate trade from the holder of a wholesale tobacco merchant's licence, a group tobacco licence or another tobacco retailer for the purposes of resale). ” ;

- (b) by inserting after subsection (2) the following subsection—

“ (2a) In any case where a licence is transferred under section 13, tobacco sold by the transferor of the licence during the relevant period shall for the purposes of assessing the fee payable under this section for the renewal of the licence be deemed to have been sold by the transferee of the licence. ” ;

- (c) in subsection (3)—

- (i) by inserting after “1977” in paragraph (b) the following—

“ and ending on or before the twenty-seventh day of February, 1982 ” ;

(ii) by deleting "or" at the end of paragraph (c);

(iii) by inserting after "1977" in paragraph (d) the following—

" and ending on or before the thirtieth day of June, 1981 " ;

(iv) by deleting the comma at the end of paragraph (d) and substituting the following—

" ; or

(e) for a retail tobacconist's licence for the period after the thirtieth day of June, 1981 and ending on or before the twenty-seventh day of February, 1982 and the applicant did not carry on tobacco retailing at all on the premises in respect of which the application is made during the whole of the period commencing on the first day of April, 1980 and ending on the thirty-first day of March, 1981, " ;

(v) by deleting "relevant period, the relevant principles of determining fees under subsection (1) and where the application is made in respect of a licensing period that is less than one year the period" and substituting the following—

" specified period, the relevant principles of determining fees under subsection (1) and where the application is made in respect of a licensing period that is less than the full period, the period " ; and

(d) by inserting after subsection (3) the following subsection—

“ (3a) Where an application is made for a wholesale tobacco merchant’s licence, a retail tobacconist’s licence or a group tobacco licence after the twenty-seventh day of February, 1982 and the applicant did not carry on either tobacco wholesaling or tobacco retailing during the whole of the relevant period, the fee payable by the applicant in respect of the licence shall be such amount as is assessed by the Commissioner as being just and reasonable in the circumstances of the case having regard to the tobacco that would have been handled by the applicant had he been carrying on the business in respect of which the application for the licence was made during the whole of the relevant period, the relevant principles of determining fees under subsection (1) and where the application is made in respect of a licensing period that is less than 2 months, the period that the licence will be in force. ” .

Section 11
amended.

10. Section 11 of the principal Act is amended by inserting after subsection (4) the following subsection—

“ (5) An authorization shall not be granted under subsection (1) in respect of a licence fee for a period ending after the twenty-seventh day of February, 1982. ” .

Section 12
amended.

11. Section 12 of the principal Act is amended by repealing subsection (9).

Sections 12A,
12B and 12C
inserted.

12. After section 12 of the principal Act, the following sections are inserted—

Recovery of
fees from
unlicensed
persons.

“ 12A. (1) Where a person was required by this Act to hold a licence in respect of any

period but did not do so, that person is liable to pay to the Commissioner a fee equal to the fee that would have been payable if he had applied for and been issued a licence in accordance with this Act.

(2) The Commissioner may assess the fee referred to in subsection (1) as if the person had applied for a licence and an assessment shall be for the period in respect of which the person was required by this Act to hold a licence or for 5 years, whichever is the lesser.

(3) As soon as practicable after an assessment is made under subsection (2), notice of the assessment shall be served by the Commissioner on the person assessed.

12B. (1) Fees payable under this Act for licences are debts due to Her Majesty and payable to the Commissioner. Recovery
of fees.

(2) Any licence fees unpaid may be sued for and recovered in any court of competent jurisdiction by the Commissioner suing in his official name.

(3) A fee payable under this Act for a group tobacco licence is a debt due jointly and severally by every person who is a member of the group during the period for which the licence is issued.

12C. (1) If during any period when a group tobacco licence is in force the composition of the group alters, every member of the group as so altered shall without delay furnish to the Commissioner full information to the satisfaction of the Commissioner concerning the alteration and shall produce his licence to the Commissioner for amendment. Amendment
of group
tobacco
licence.

Penalty: Five hundred dollars.

(2) On receipt of information and upon production of a licence in accordance with subsection (1), the Commissioner may amend the licence and return it to the holder. ” .

Schedule 1
added.

13. After section 20 of the principal Act, the following Schedule is added—

“ SCHEDULE 1 (Section 2(1))

RELEVANT PERIODS FOR WHOLESALe TOBACCO
MERCHANT'S LICENCES, RETAIL TOBACCONIST'S
LICENCES AND GROUP TOBACCO LICENCES

Column 1 Licence period	Column 2 Sales period on which licence fee is based
March and April	December and January
May and June	February and March
July and August	April and May
September and October	June and July
November and December	August and September
January and February	October and November

” .
