

Business Franchise (Tobacco) (Amendment) Bill

EXPLANATORY MEMORANDUM

Clause 1 outlines the purposes of the Bill.

Clause 2 specifies that this Bill comes into operation on the date it receives Royal Assent.

Clause 3 provides that the **Business Franchise (Tobacco) Act 1974** is the Principal Act for the purposes of the Bill.

Clause 4 amends section 2 of the Principal Act to insert new definition provisions.

Sub-clause 4 (1) inserts the following definitions into section 2 (1) of the Principal Act—

- definition of ‘associate’ which is to have substantially the same meaning as it would in the **Corporations Law** if parts of section 12 (if the references to the primary persons entitlement to shares or agreement under a takeover) and sections 13, 14, 16 (2) and 17 of the Law were repealed.
- a definition of “Australian citizen” which is to have the same meaning as in the Australian Citizenship Act 1948 of the Commonwealth.
- a definition of “Australian resident” which is an Australian citizen or a person ordinarily resident in Australia.
- a definition of “corresponding law” which is to have the same meaning as in the **Taxation Reciprocal Powers Act 1987**.

a definition of “director” which is to have the same meaning as in section 9 of the **Corporations Law**.

- a definition of “related body corporate” which is to have the same meaning as in section 9 of the **Corporations Law**.

a definition of “sell” which is to include an offer to sell.

- a definition of “share” which is to have the same meaning as in section 9 of the **Corporations Law**. “Share” means a share in the share capital of a body, and includes stock except where a distinction between stock and shares is expressed or implied.

a definition of “State Taxation Act” which is to have the same meaning as in the **Taxation Reciprocal Powers Act 1987**.

Sub-clause 4 (2) amends section 2 of the Principal Act to insert two new provisions—

- a new section 2 (5) is inserted which provides that any person endorsed on a group wholesale tobacco merchant’s licence is deemed to hold the licence and that any reference to the holder of such licence includes a reference to each person named on it.

- a new section 2 (5A) is inserted which provides that any shares in a corporation to which a person is entitled includes shares in a corporation to which a person is entitled under section 609 of the **Corporations Law**.

Clause 5 amends section 2C of the Principal Act to delete references to sub-sections and repeal certain provisions consequent upon the new provisions in section 2CA inserted by this Bill.

Clause 6 inserts a new section 2CA into the Principal Act which provides that a person (or persons acting together) are taken to have a controlling interest in circumstances which include the following—

- in a corporation, if directors act in accordance with the wishes of those persons, or if those persons have an interest in a business of a corporation with a share capital, if those persons are entitled to half or more of the voting shares;
- in a business, if that person owns more than half of the capital, or is entitled to half or more of the profits, or if that person is the owner of a business as a trustee, or is a beneficiary of half or more of the value of the interests in the trust, or may benefit under the exercise of a discretion under a discretionary trust to be a beneficiary of half or more of the interests in that trust.

Clause 7 amends section 6 of the Principal Act to insert a new provision and amend existing references as follows—

- a new section 6 (1) is inserted which prohibits any person from carrying on tobacco wholesaling on or after 1 August 1995 unless a wholesale tobacco merchant's licence or group wholesale tobacco merchant's licence is held. A penalty is provided for breach.
- section 6 (3) is amended to extend the penalty which a court may order under that section to any person in breach of section 6 (1).

Clause 8 amends section 7 of the Principal Act as follows—

- sub-sections (1) (b) and (c) and (1A) are repealed as these provisions are extraneous consequent upon the provisions in sections 7AA and 7AD inserted by this Bill;
- sub-sections (3) and (3A) are amended to clarify that they apply solely to an application for a retail tobacconist's licence;
- sub-sections (5) (a) and (6) are amended to delete extraneous references consequent upon the provisions in sections 7AA and 7AD inserted by this Bill;
- sub-section (5) is amended to remove the necessity of persons who are ceasing retailing to notify the Commissioner in a prescribed form.

Clause 9 amends the Principal Act to insert a new series of provisions related to applications for a wholesale or group wholesale tobacco merchant's licence as follows—

- a new section 7AA is inserted which provides for applications for a wholesale or group wholesale tobacco merchant's licence by new applicants.

Sub-sections (1) and (2) provide that persons who do not hold a wholesale tobacco merchant's licence or a group wholesale tobacco merchant's licence may apply for a licence, to commence on the third month following their application.

Sub-sections (3) and (4) provide that persons applying for either a wholesale tobacco merchant's licence or a group wholesale tobacco merchant's licence must submit an application in the prescribed form, containing a full and true disclosure of all facts material to the application (including the names and addresses of directors or members of the group where applicable) supported by a statutory declaration.

Sub-section (5) provides that statutory declarations by corporate applicants may be completed by a director;

Sub-section (6) provides that an applicant may apply under this section whether or not resident or carrying on business in Victoria.

Sub-section (7) provides that a person who applies under this section must pay the fee required for the licence.

a new section 7AB is inserted which provides for matters to be considered by the Commissioner in determining a new licence application under section 7AA.

Sub-section (1) provides that a Commissioner must not grant a wholesale tobacco merchant's licence unless satisfied that the applicant—

- is an Australian resident (or incorporated in Australia);
- is a fit and proper person to be associated with tobacco wholesaling (and each of its directors are suitable persons);
- has access to sufficient financial resources to carry on tobacco wholesaling;
- has not (and none of its directors have) been convicted of an offence under a taxing Act of Victoria, the Commonwealth or another State or a Territory punishable by a fine of \$1,000 or more within 5 years preceding the date of the application;
- has or will have suitable facilities for the safe storage and distribution of tobacco; and
- has or will obtain any necessary permits for the premises where tobacco is to be stored.

Sub-sections (2) and (3) require the Commissioner to refuse an application for a wholesale tobacco merchant's licence or a group wholesale tobacco merchant's licence by an applicant where that applicant held a wholesale tobacco merchant's licence or a group wholesale tobacco merchant's licence at any time in the year preceding the month in which the licence is applied for. Where an associate of the applicant previously held a wholesale licence, the Commissioner may refuse the licence application.

Sub-section (4) enables the Commissioner, in determining an applicant's suitability under sub-section (1) to take into account—

- whether the applicant has been convicted of an offence of any law of Victoria, the Commonwealth or other State or a Territory which is punishable by a fine of \$5,000 or more (or if a director has been so convicted);
- the report of any investigation carried out under section 7AC; and
- whether each associate of the applicant (and associates of each director) is of good fame and character.

Sub-section (5) provides that, for the purposes of determining a group wholesale tobacco merchant’s licence application, a reference to an applicant includes each member of the group applying for the licence.

- a new section 7AC is inserted which provides for the investigation of an application under Section 7AA as follows—
 - *Sub-section (1)* requires the Commissioner to make all investigations and inquiries to properly consider an application;
 - *Sub-section (2)* requires a Police report to be delivered within 30 days of the Commissioner’s request;
 - *Sub-section (3)* enables the Commissioner to require a report from a registered auditor as to the financial affairs of the applicant, any director or any member of the group.
 - *Sub-section (4)* defines the “registered auditor” referred to in this section as an auditor registered under Part 9.2 of the **Corporations Law**.
- a new section 7AD is inserted which provides for applications for a wholesale or group wholesale tobacco merchant’s licence in the following month by existing licence holders.

Sub-sections (1) and *(2)* provide that persons who hold either a wholesale tobacco merchant’s licence or a group wholesale tobacco merchant’s licence in a month may apply for a licence for the following month.

Sub-section (3) provides that persons applying under sub-sections (1) or (2) must make application (within 7 days before the expiry of the current licence) in the prescribed form, containing a full and true disclosure of all facts material to the application (including the names and addresses of directors or members of the group where applicable) by way of statutory declaration. The application must also contain a statement as to whether or not the applicant intends to carry on tobacco wholesaling for two months following the month for which the licence is applied.

Sub-section (4) provides that statutory declarations by corporate applicants may be completed by a director.

Sub-section (5) provides that an applicant may apply under this section whether or not resident or carrying on business in Victoria.

Sub-section (6) provides that a person who applies under this section must pay the fee required for the licence.

a new section 7AE is inserted which provides that the Commissioner must grant an application under section 7AD unless satisfied as follows—

- that the applicant has failed to provide information or provided information that was false or misleading;
 - the licence holder has contravened the Act;
 - the licence holder is not an Australian resident or incorporated in Australia;
 - the licence holder, or the director of a licence holder (in the case of a corporation) is not a fit or proper person to be associated with the carrying on of tobacco wholesaling;
 - the licence holder does not have sufficient financial resources to carry on tobacco wholesaling for the licence period or any future period for which an intention is indicated under section 7AD to carry on tobacco wholesaling;
 - that the licence holder has been convicted on an offence under a state taxing Act of Victoria, the Commonwealth or any other State or a Territory punishable by a fine of \$1,000 or more within 5 years preceding the date of application (or where a director has been convicted of such offence in the case of a corporate licence holder);
 - the licence holder does not have suitable facilities for the safe storage and distribution of tobacco;
 - the licence holder does not have a necessary permit in relation to the premises in which the tobacco will be stored.
- a new section 7AF is inserted which provides for the Commissioner to grant or refuse applications under either section 7AA or section 7AD.

Sub-section (1) requires the Commissioner to grant or refuse an application and notify that determination in writing to the applicant.

Sub-section (2) requires that where an application is granted, the Commissioner must issue a licence (endorsed with the name of each member of the group in appropriate cases).

Sub-section (3) requires the Commissioner to give reasons for a refusal to grant a licence application with his notification under sub-section (1).

Sub-section (4) enables the Commissioner to refuse to issue the licence until the fee required to be paid is paid in full.

a new section 7AG is inserted which provides that any licence issued under section 7AF must specify the premises on which the tobacco wholesaling business is to be carried on.

- a new section 7AH is inserted which provides for the review of the decision of the Commissioner with respect to a licence.

Sub-section (1) provides that the Commissioner's decision either to grant or refuse a licence, or suspend or revoke a wholesale tobacco merchant's licence or a group wholesale tobacco merchant's licence, or any assessment of a fee in respect of those licences for the first two months for which a licence is applied for, is not reviewable in any court or tribunal, except as provided by sub-section (2).

Sub-section (2) provides that the only basis on which any Court proceedings may be brought in respect of any decision of the Commissioner referred to in sub-section (1), is by Supreme Court proceedings for judicial review or proceedings under the **Administrative Law Act 1978**.

- a new section 7AI is inserted which requires a person who has applied under section 7AA and 7AD (whether or not a licence has already issued) to notify the Commissioner of any change to the particulars of the application within 14 days, and those particulars are considered to form part of the original application.
- a new section 7AJ is inserted which requires a person holding a wholesale tobacco merchant's licence or a group wholesale tobacco merchant's licence who ceases trading to notify the Commissioner within 14 days and surrender the licence to the Commissioner.

Clause 10 amends the Principal Act by inserting a new section 7B which prohibits the sale of tobacco to unlicensed persons.

- *Sub-section (1)* prohibits the holder of a wholesale tobacco merchant's licence or a group wholesale tobacco merchant's licence from selling tobacco to a person who does not hold a licence.
- *Sub-section (2)* prohibits the holder of a retail tobacconist's licence from purchasing tobacco from a person who does not hold a licence.
- *Sub-section (3)* provides that sub-sections (1) and (2) do not apply in respect of a sale or purchase of tobacco outside Victoria unless the delivery of that tobacco is to take place in Victoria.

Clause 11 amends the Principal Act to insert a new series of provisions related to selling discounted tobacco and the suspension and revocation of wholesale licences.

- a new section 9A is inserted which provides for the regulation of discounting.

Sub-section (1) applies this section to a person who has indicated an intention not to continue tobacco wholesaling in an application under section 7AD;

Sub-section (2) prohibits such a person selling tobacco at less than the discount approved under sub-section (3) during the cessation months.

Sub-section (3) enables the Minister in a notice in the Government Gazette to declare in relation to a class of tobacco, a listed price for that tobacco, a percentage of a price as the approved discount and the approved discount price.

Sub-section (4) enables the notice to incorporate provisions in an issue of the Australian Retail Tobacconist published by the New South Wales Retail Tobacco Traders' Association.

Sub-section (5) defines “cessation months” for the purposes of this section.

a new section 9B is inserted which provides for the suspension of wholesale licences.

Sub-section (1) enables the Commissioner to suspend a wholesale or group wholesale tobacco licence if he reasonably believes—

- that the licence holder has failed to provide information or provided false and misleading information;
- that the licence holder has contravened the Act;
- that the licence holder is not an Australian resident or incorporated in Australia;
- that the licence holder (or a director) is not a fit and proper person to be connected with tobacco wholesaling;
- that the licence holder does not have sufficient financial resources either for the current month or any future months for which he has stated an intention to carry on tobacco wholesaling in a notice under section 7AD;
- that the licence holder (or a director) has been convicted of an offence under a taxing Act of Victoria, the Commonwealth or another State or a Territory punishable by fine of \$1,000 or more within 5 years prior to the date of application;
- that the licence holder does not have suitable facilities and equipment for the safe storage and distribution of tobacco;
- that the licence holder does not have a permit in relation to the premises in which tobacco is to be stored.

Sub-section (2) provides that a suspension is effective from the time that notice of it is given to the licence holder.

Sub-section (3) requires the notice of suspension to indicate reasons for this suspension and require the licence holder to show cause why the licence should not be revoked within 14 days.

Sub-section (4) defines “licence” and “licence holder” for the purposes of this section.

- a new section 9c is inserted which provides that the effect of a suspension is that, for the purposes of the prohibition upon wholesaling and the restrictions on sales to retailers or other persons, a person is taken not to hold their licence whilst the suspension remains in force.

a new section 9D is inserted which provides for the revocation of wholesale licences by the Commissioner, after 14 days after the notice of suspension is served and having taken into account any submission of the licence holder, if he is satisfied that any belief under section 9B (1) is correct and had he known the matter at the time of determining the licence application, he would not have granted the licence.

Clause 12 inserts a new section 19^{EA} (2) into the Principal Act. This provision presumes that any person in possession of more than 5 kilograms of tobacco or more than 3500 cigarettes has that tobacco in his possession for the purposes of sale and (unless that person has a retail tobacco licence) is carrying on tobacco wholesaling.

Clause 13 makes two consequential amendments to the Principal Act.

- section 10 (7) is amended to remove the reference to section 7 of the Act to ensure that section 10 (7), which provides a right of assessment where the Commissioner believes he has not been paid the correct fee for the issue of a licence, will apply to wholesale licences.
- section 11^B (2) is amended to remove the reference to section 7 (4) of the Act to ensure that wholesalers are required to keep copies of invoices at one of the premises specified in their licence.

Clause 14 amends section 21^A of the Principal Act to insert a reference to section 7^{AH} (which removes the ability of any Court to review decisions of the Commissioner) as a provision intended to alter or vary section 85 of the **Constitution Act 1975**.

Clause 15 is a transitional provision which provides that the former provisions apply to an application for issuing a wholesale licence for the month of July 1995.

Clause 16 is a transitional provision which provides that an application for a wholesale licence for the month of August 1995 under section 7^{AA} of the Act must be made on or before 30 June 1995.

Clause 17 is a transitional provision which allows persons holding a wholesale licence in July 1995 to apply for a licence for August 1995, by 7 July 1995. Any person holding a wholesale licence in July 1995 will have their application for the month of August 1995 determined as if they had applied under section 7^{AA}.