



Australian Capital Territory

Business Franchise (“X” Videos) Act 1990

No. 16 of 1990

TABLE OF PROVISIONS

PART I—PRELIMINARY

Section

1. Short title
2. Commencement
3. Incorporation of *Taxation (Administration) Act 1987*
4. Interpretation

PART II—LICENCES

Division 1—General provisions

5. Grant
6. Term
7. Variation of conditions
8. Change of licensed premises
9. Renewal
10. Cancellation
11. Surrender
12. Expiration

Division 2—Licensees’ obligations

TABLE OF PROVISIONS—continued

Section

- 13. Records
 - 14. Corporate licensees—change of personnel
 - 15. Invoices—wholesale licensees
- Division 3—Licence fees*

- 16. Interpretation
- 17. Extra-territorial application
- 18. Basic fee
- 19. Advance fee
- 20. Franchise fee
- 21. Application of advance fee and franchise fee

PART III—ADMINISTRATIVE REVIEW

- 22. Notice of decisions
- 23. Review by Tribunal

PART IV—OFFENCES

- 24. Wholesaling “X” videos
- 25. Retailing “X” videos
- 26. Wholesale invoices

PART V—MISCELLANEOUS

- 27. Recovery of fees from unlicensed persons
- 28. Conduct of directors, servants and agents
- 29. Corporations—penalties
- 30. Regulations



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Business Franchise (“X” Videos) Act 1990

No. 16 of 1990

An Act for the licensing of the distribution of “X” videos

[Notified in ACT Gazette S28: 21 June 1990]

The Legislative Assembly for the Australian Capital Territory enacts as follows:

PART I—PRELIMINARY

Short title

1. This Act may be cited as the *Business Franchise (“X” Videos) Act 1990*.

Commencement

2. (1) Section 1 and this section commence on the day on which this Act is notified in the *Gazette*.

(2) The remaining provisions of this Act, with the exception of Part IV and section 27, commence on 1 July 1990.

(3) Part IV and section 27 commence on 15 July 1990.

Incorporation of *Taxation (Administration) Act 1987*

3. The Tax Act is incorporated and is to be read as one with this Act.

Interpretation

4. (1) In this Act, unless the contrary intention appears—

“advance fee” means the fee calculated in accordance with subsection 19 (1) or (2), as the case requires;

“basic fee” means the fee calculated in accordance with section 18;

“franchise fee” means the fee calculated in accordance with section 20;

“licence” means a wholesale licence or a retail licence;

“retail” includes—

- (a) hire to another person in the course of retail trade; and
- (b) carry on the business of retailing;

“retail licence” means a retail “X” video merchant’s licence granted under section 5;

“Tax Act” means the *Taxation (Administration) Act 1987*;

“video” means a video tape or a video disc;

“wholesale” includes—

- (a) hire to another person for the purpose of retail or wholesale trade; and
- (b) carry on the business of wholesaling;

“wholesale licence” means a wholesale “X” video merchant’s licence granted under section 5;

“wholesale value”, in relation to an “X” video, means the price for which the video could reasonably be expected to have been sold by wholesale;

“ ‘X’ video” means a video classified as an “X” film under the *Classification of Publications Ordinance 1983*.

(2) A reference in this Act to a person who wholesales or retails “X” videos is not, unless the contrary intention appears, to be read as including a reference to a person who does so as an agent or employee of another person.

(3) A reference in this Act to an offence against this or another Act is to be read as including a reference to an offence—

- (a) against regulations under the relevant Act; and
- (b) under Part VIII of the *Crimes Act 1900* of the State of New South Wales in its application in the Territory in relation to the first-mentioned offence.

PART II—LICENCES

Division 1—General provisions

Grant

5. (1) An application for a wholesale or retail “X” video merchant’s licence shall be in writing and accompanied by—

- (a) the basic fee;
- (b) an amount equal, in the estimation of the applicant on reasonable grounds, to the advance fee; and
- (c) details of the information relied on by the applicant in estimating the advance fee.

(2) On application in accordance with subsection (1), the Commissioner shall grant a licence of the type applied for, subject to such conditions as he or she thinks fit, if the Commissioner is satisfied on reasonable grounds in the circumstances that the applicant is a fit and proper person to hold a licence of that type.

(3) The circumstances referred to in subsection (2) include the following:

- (a) if the applicant is a natural person—whether he or she is an undischarged bankrupt;

- (b) if the applicant is a body corporate—whether it is being wound up;
- (c) whether an amount under a tax law is due by the applicant;
- (d) whether the applicant has contravened a provision of this Act, the Tax Act or the *Publications Control Act 1989*;
- (e) whether the applicant has been convicted of an offence punishable on conviction by a fine of not less than \$10,000 or by imprisonment for a period of not less than 1 year.

(4) In paragraphs (3) (c), (d) and (e), a reference to an applicant is to be read, where the applicant is a body corporate, as including a reference to each director, secretary and officer of the body.

(5) If the Commissioner refuses to grant a licence, he or she shall refund to the applicant an amount equal to the amount accompanying the application.

(6) A licence shall specify—

- (a) the full name and address of the licensee;
- (b) the premises in relation to which the licence is granted; and
- (c) the conditions (if any) to which the licence is subject.

Term

6. A licence remains in force until the expiration of the last day of the month in which it was granted and may be renewed in accordance with section 9.

Variation of conditions

7. (1) The Commissioner may vary the conditions specified in a licence, with effect from a date specified in the notice of variation given pursuant to section 22 (being not less than 28 days after the date of the notice).

(2) Within 28 days of service of a notice referred to in subsection (1), the licensee shall not, without reasonable excuse, fail to submit the licence to the Commissioner.

Penalty: \$2,000.

(3) On receipt of a licence, the Commissioner shall amend the licence accordingly and return it to the licensee within 7 days.

Change of licensed premises

8. (1) A licensee shall, no later than 28 days before—

- (a) wholesaling or retailing (as the case requires) "X" videos at premises other than those specified in the licence; or
- (b) ceasing to wholesale or retail (as the case requires) "X" videos at particular premises specified in the licence;

submit the licence to the Commissioner together with written notice of the proposed change and the proposed date of the change.

(2) On receipt of a notice, the Commissioner shall amend the licence accordingly and return it to the licensee within 7 days.

(3) The amendment of a licence under subsection (2) shall take effect on the date specified in the notice under subsection (1).

Renewal

9. (1) On application by a licensee in accordance with subsection (2) for the renewal of the licence, the Commissioner shall, on receipt of the particulars (if any) required under section 18 of the Tax Act, renew the licence.

(2) An application shall be—

- (a) made no later than 7 days before the expiration of the term of the licence;
- (b) accompanied by the basic fee;
- (c) accompanied by—
 - (i) in the case of the first application for the renewal of a licence—an amount equal, in the estimation of the applicant on reasonable grounds, to the advance fee; or
 - (ii) in any other case—the franchise fee; and
- (d) the information relied on by the applicant in—
 - (i) estimating the advance fee; or

- (ii) calculating the franchise fee;

as the case requires.

(3) The Commissioner may renew a licence on an application for renewal not made in accordance with subsection (2).

(4) If the Commissioner refuses to renew a licence, he or she shall, if the application is accompanied by the basic fee, refund to the applicant an amount equal to that fee.

(5) If the Commissioner refuses to renew a licence, he or she shall refund to the applicant an amount equal to the total of the amounts accompanying the application.

(6) Section 19 does not affect liability for a franchise fee calculated in relation to "X" videos (within the meaning of Division 3)—

- (a) supplied by wholesale; or
- (b) offered for retail sale;

in the first 2 months after the licence is granted.

Cancellation

10. (1) The Commissioner may cancel a licence if satisfied on reasonable grounds that—

- (a) the licence was granted in error or in consequence of a false statement made, or misleading information furnished, by the applicant for the licence;
- (b) the licensee has contravened a condition to which the licence is subject;
- (c) the licensee has contravened a provision of this Act, the Tax Act or the *Publications Control Act 1989*;
- (d) the licensee has been convicted of an offence—
 - (i) against this Act, the Tax Act or the *Publications Control Act 1989*; or
 - (ii) punishable on conviction by a fine of not less than \$10,000 or by imprisonment for a period of not less than 1 year;

- (e) if the licensee is a natural person—he or she is an undischarged bankrupt;
- (f) if the licensee is a body corporate—it is being wound up; or
- (g) the licensee is not a fit and proper person to hold a licence of that type.

(2) In paragraphs (1) (c), (d) and (g), a reference to a licensee is to be read, where the licensee is a body corporate, as including a reference to a director, secretary or officer of the body.

(3) The Commissioner shall, before cancelling a licence, by notice in writing to the licensee, invite the licensee to show cause why the licence should not be cancelled.

(4) A notice shall contain—

- (a) particulars of the facts and circumstances relied upon by the Commissioner to establish that a ground for cancellation exists; and
- (b) a statement to the effect that the licensee may, within such period as is specified in the notice (being a period of not less than 14 days after the date the notice is given), give to the Commissioner written particulars of the facts and circumstances relied on to show that the licence should not be cancelled.

(5) If a licensee does not, within the time specified in the notice, in the opinion of the Commissioner based on reasonable grounds, show cause why the licence should not be cancelled, the Commissioner shall cancel the licence.

(6) Cancellation of a licence takes effect on the expiration of the day on which notice of the cancellation is given to the licensee under section 22.

Surrender

11. (1) Within 7 days after ceasing to wholesale or retail (as the case requires) "X" videos, a licensee shall not, without reasonable excuse, fail to surrender the licence by giving written notice of surrender, together with the licence, to the Commissioner.

Penalty: \$2,000.

(2) The surrender of a licence takes effect on the date the notice of surrender is given in accordance with subsection (1).

Expiration

12. Upon the expiration of a licence by cancellation or lapse of time, the former licensee shall not, without reasonable excuse, fail to return the licence to the Commissioner within 7 days of its expiration.

Penalty: \$2,000.

Division 2—Licensees' obligations

Records

13. In addition to any records kept pursuant to section 96 of the Tax Act, a licensee shall keep such records as are prescribed.

Penalty: \$500.

Corporate licensees—change of personnel

14. Where there is a change in the occupancy of a position of director, secretary or officer of a body corporate which holds a licence, or a new appointment to such a position, the body shall not, without reasonable excuse, fail to give written notice of the change or appointment to the Commissioner within 7 days after the change or appointment.

Penalty: \$2,000.

Invoices—wholesale licensees

15. A wholesale licensee shall write or cause to be written on the invoice issued in relation to a video supplied in pursuance of the licence the words

“SUPPLIED BY A LICENSED ACT WHOLESALER”

so that they are clearly legible.

Penalty: \$500.

Division 3—Licence fees

Interpretation

16. In this Division—

“ ‘X’ video”, in relation to—

- (a) in the case of a video referred to in subsection 19 (1) or 20 (1)—its supply; or
- (b) in any other case—its being offered for retail sale;

includes a video which at the time of that supply or offer was not classified, or which had been refused classification, under the *Classification of Publications Ordinance 1983*, but which is later classified as an “X” film.

Extra-territorial application

17. This Division applies in relation to—

- (a) the supply of an “X” video by a wholesale licensee; or
- (b) the offer of an “X” video for retail sale by a retail licensee;

whether the video is manufactured, supplied or offered for sale by wholesale or retail within or outside the Territory.

Basic fee

18. The basic fee for the grant or renewal of a licence is \$50 for each premises in relation to which a licence is held or is to be held.

Advance fee

19. (1) The advance fee, in relation to the grant or the first renewal of a wholesale licence, is an amount equal to 40% of the total wholesale value of the “X” videos supplied by wholesale by the licensee in the month for which the licence is granted or renewed.

(2) The advance fee, in relation to the grant or the first renewal of a retail licence, is an amount equal to 40% of the total wholesale value of—

- (a) the “X” videos manufactured by the licensee; and

- (b) the "X" videos supplied to the licensee otherwise than in accordance with a wholesale licence;

being videos offered for retail sale by the licensee in the month for which the licence is granted or renewed.

(3) An advance fee is due and payable by the relevant licensee (or, where the relevant licence is no longer in force, by the former licensee) to the Territory at the expiration of the month in relation to which it is calculated.

(4) For the purposes of this Act and the Tax Act, an amount paid to the Territory under paragraph 5 (1) (b) or subparagraph 9 (2) (c) (i) is to be taken to be a payment on account of the relevant advance fee.

Franchise fee

20. (1) The franchise fee for the renewal of a wholesale licence is an amount equal to 40% of the total wholesale value of the "X" videos supplied by wholesale by the licensee in the month which is 2 months prior to the month for which the renewal is sought.

(2) The franchise fee for the renewal of a retail licence is an amount equal to 40% of the total wholesale value of—

- (a) the "X" videos manufactured by the licensee; and
- (b) the "X" videos supplied to the licensee otherwise than in accordance with a wholesale licence;

being videos offered for retail sale by the licensee in the month which is 2 months prior to the month for which the renewal is sought.

Application of advance fee and franchise fee

21. No advance fee or franchise fee is payable in relation to the supply or offer for retail sale of an "X" video where either such fee is payable in relation to any previous supply, or any previous offer for retail sale, of that video.

PART III—ADMINISTRATIVE REVIEW

Notice of decisions

22. (1) Where the Commissioner makes a decision—

- (a) refusing to grant a licence;

- (b) granting a licence subject to conditions;
- (c) varying a condition to which the licence is subject;
- (d) refusing to renew a licence; or
- (e) cancelling a licence;

he or she shall, within 28 days of the date of the decision, cause notice in writing of the decision to be given to the applicant or licensee, as the case requires.

(2) A notice under subsection (1) shall—

- (a) include a statement to the effect that, subject to the *Administrative Appeals Tribunal Act 1989*, an application may be made to the Australian Capital Territory Administrative Appeals Tribunal for a review of the decision; and
- (b) except where subsection 26 (11) of that Act applies—include a statement to the effect that the person to whom the notice is given may request a statement pursuant to section 26 of that Act.

(3) The validity of a decision referred to in subsection (1) is not to be taken to be affected by a failure to comply with subsection (2).

Review by Tribunal

23. Application may be made to the Australian Capital Territory Administrative Appeals Tribunal for a review of a decision referred to in subsection 21 (1).

PART IV—OFFENCES

Wholesaling "X" videos

24. (1) A person who is not—

- (a) a wholesale licensee; or
- (b) an employee or agent of a wholesale licensee acting pursuant to that employment or agency;

shall not wholesale an "X" video.

Penalty: \$5,000 or imprisonment for 2 years, or both.

(2) A wholesale licensee, or an employee or agent of a wholesale licensee, shall not wholesale an "X" video except in accordance with the licence.

Penalty: \$2,000 or imprisonment for 1 year, or both.

Retailing "X" videos

25. A person shall not retail an "X" video except in accordance with a retail licence.

Penalty: \$2,000 or imprisonment for 1 year, or both.

Wholesale invoices

26. (1) A person who is not a wholesale licensee shall not write or cause to be written on an invoice issued in relation to an "X" video supplied by that person the words

"SUPPLIED BY A LICENSED ACT WHOLESALER"

or words to the same effect.

Penalty: \$1,000.

(2) Subsection (1) does not apply where a video is supplied in accordance with a wholesale licence by an employee or agent of the licensee.

PART V—MISCELLANEOUS

Recovery of fees from unlicensed persons

27. (1) A person who, in the opinion of the Commissioner based on reasonable grounds, wholesales or retails "X" videos without the appropriate licence is liable to pay the Territory an amount equal to the sum of the fees which would have been payable under this Act if such a licence had—

- (a) been granted to the person immediately before the date of the first such transaction;
- (b) been renewed (as necessary) each month after that date until the expiration of the last month before the last such transaction; and
- (c) expired immediately after the last such transaction.

(2) Subsection (1) applies whether or not the relevant wholesaler or retailer is convicted of an offence against section 24 or 25.

(3) The Tax Act applies in relation to this section as if a licence had been granted, renewed and expired in the manner referred to in paragraphs (1) (a), (b) and (c).

Conduct of directors, servants and agents

28. (1) Where, for the purposes of this Act, it is necessary to establish the state of mind of a body corporate or a natural person in relation to particular conduct, it is sufficient to show—

- (a) that a director, servant or agent of the body, or a servant or agent of the person, had that state of mind; and
- (b) that the conduct was engaged in by that director, servant or agent within the scope of his or her actual or apparent authority.

(2) A reference in subsection (1) to the state of mind of a body or person is to be read as including a reference to—

- (a) the knowledge, intention, opinion, belief or purpose of the body or person; and
- (b) the body's or person's reasons for the intention, opinion, belief or purpose.

(3) Any conduct engaged in on behalf of a body corporate or a natural person by a director, servant or agent of the body, or a servant or agent of the person, within the scope of his or her actual or apparent authority is to be taken, for the purposes of this Act, to have been engaged in also by the body or person unless the body or person establishes that reasonable precautions were taken and due diligence was exercised to avoid the conduct.

(4) Where—

- (a) a natural person is convicted of an offence against this Act; and
- (b) the person would not have been convicted of the offence if subsections (1) and (3) had not been enacted;

the person is not liable to be punished by imprisonment for that offence.

(5) A reference in this section to engaging in conduct is to be read as including a reference to failing or refusing to engage in conduct.

Corporations—penalties

29. Where a body corporate is convicted of an offence against this Act, other than an offence against section 14, the penalty that the Court may impose is a fine not exceeding 5 times the maximum amount that, but for this section, the Court could impose as a pecuniary penalty for that offence.

Regulations

30. The Executive may make regulations, not inconsistent with this Act, prescribing matters—

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

[Presentation speech made in Assembly on 31 May 1990.]