

1990

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

BUSINESS FRANCHISE ("X" VIDEOS) BILL 1990

TAXATION (ADMINISTRATION) (AMENDMENT) BILL (NO. 3) 1990

EXPLANATORY MEMORANDUM

Circulated by Authority of the Minister for

Finance and Urban Services

Craig Duby MLA

BUSINESS FRANCHISE ('X' VIDEOS) BILL 1990

TAXATION (ADMINISTRATION)(AMENDMENT) BILL (NO. 3) 1990

The combined effect of the Business Franchise ('X' Videos) Bill 1990 and the Taxation (Administration)(Amendment) Bill (No. 3) 1990 is to enable licence and franchise fees to be imposed on trade in 'X' classified videos in the ACT.

Business Franchise ('X' Videos) Bill 1990

This Bill will establish a licensing scheme for wholesalers and retailers of 'X' classified videos to commence from 1 July 1990. The licence fee will be \$50 per month for each premises from which a licensee operates.

In addition a wholesale licensee will be liable to pay to the ACT ad-valorem fees at the rate of 40%. These are:-

1. an advance fee - in relation to the grant and first renewal of a licence based on the wholesale value of 'X' videos supplied by wholesale in the month for which the licence is granted or renewed, and
2. a franchise fee - in relation to all subsequent licence renewals based on the wholesale value of 'X' videos supplied in the months which is 2 months prior to the month for which the renewal is sought.

Because the ad-valorem fees, for the most part, will be payable by licensed wholesalers a retail licensee will only be liable to pay an ad-valorem fee in relation to 'X' videos supplied from unlicensed sources outside the Territory and from which no fee will be recoverable. The fee will be 40% of the wholesale value.

The Commissioner for ACT Revenue administers the Bill. Decisions of the Commissioner will be reviewable by the ACT Administrative Appeals Tribunal.

The Bill details the considerations to be taken account of by the Commissioner before granting, renewing or cancelling a licence.

Specific offences exist for trading in 'X' videos without a licence or not in accordance with a licence.

Regard has been had to the need to allow persons who trade in 'X' videos a sufficient time to become licensed under the Bill so as to remove the risk of prosecution.

The Bill calls up the provisions of the Taxation (Administration) Act 1987 to facilitate the enforcement of the Bill.

Details of the Bill are included in Attachment A.

Taxation (Administration) (Amendment) Bill (No. 3) 1990

This Bill will supplement the Business Franchise ('X' Videos) Bill 1990 by amending the Taxation (Administration) Act 1987 so as to ensure that the powers under that Act which apply to other tax laws will apply also to the licensing and franchise scheme for trade in 'X' videos.

These powers relate, in particular, to -

- . inspection;
- . seizure of videos;
- . assessment of licence and franchise fees;
- . the seeking of further information; and
- . the imposition of penalty taxes in specific circumstances.

Details of the Bill are included in Attachment B.

Financial Considerations

It is estimated that the proposals will earn up to \$4 million in revenue for the ACT in the 1990/91 financial year.

BUSINESS FRANCHISE ('X' VIDEOS) BILL 1990

PART I - PRELIMINARY

Part I consists of clauses 1 to 4 and deals with preliminary matters pertaining to the Bill.

Clause 1 cites the short title of the Bill, once enacted, as the Business Franchise ('X' Videos) Act 1990 (the Act).

Clause 2 provides for the commencement of the Bill.

Subclause 2 (1) provides that clauses 1 and 2 are to commence when the Act is notified in the Gazette.

Subclause 2(2) provides that the remaining provisions of the Act, except for Part IV and section 26, are to commence on 1 July 1990.

Subclause 2(3) provides for Part IV and section 26 to commence on 15 July 1990. This ensures that a person who trades in "x" videos before the commencement of the Bill will have sufficient time to comply with the licensing requirements without becoming liable to be prosecuted for an offence or for payment of fees.

Clause 3 provides that the Taxation (Administration) Act 1987 (the Tax Act) is to be read as one with the Act.

Clause 4 deals with interpretation.

Subclause 4(1) defines certain terms.

Subclause 4(2) provides that a reference in the Act to a person who wholesales or retails "X" videos will not include someone who is acting as an agent or employee of another person.

Subclause 4(3) provides that a reference in the Act to an offence against this or another Act will include both an offence against the regulations of that Act and an offence referred to in Part VIII of the New South Wales Crimes Act 1900 as it applies in the ACT in relation to the first-mentioned offence.

PART II LICENCES

Part II of the Bill, which deals with licences, comprises three divisions.

Division 1 - General Provisions

Division 1, which consists of clauses 5 to 12 deals with general provisions relating to licences.

Clause 5 deals with the granting of a licence.

Subclause 5(1) provides that an application for a licence should be in writing and accompanied by the basic fee, together with an estimated advance fee detailed in clause 19.

Subclause 5(2) provides that the Commissioner shall grant either a wholesale or retail licence if satisfied on reasonable grounds that the applicant is a fit and proper person.

Subclause 5(3) provides that circumstance referred to in 5(2):

- (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.

Subclause 5(4) provides that criteria (c), (d) and (e) in subclause 5(3) are to be applied to each director, secretary and officer in the case where the applicant for a licence is a body corporate.

Subclause 5(5) provides that, where the Commissioner refuses to grant a licence, he or she shall refund to the applicant an amount equal to the total of the amounts accompanying the application.

Subclause 5(6) provides that a licence shall set out the name and address of the licensee, the premises in relation to which it was granted and any condition to which it is subject.

Clause 6 provides that a licence will remain in force until the expiration of the month in which it was granted and that it may be renewed in accordance with clause 9.

Clause 7 deals with the variation of conditions specified in the licence.

Subclause 7(1) allows the Commissioner to vary the conditions of a licence by notice issued under clause 22 and makes that variation effective as of a date not less than 28 days after the date of the notice.

Subclause 7(2) requires the licensee to submit the licence to the Commissioner within 28 days of the issuance of the notice unless the licensee has a reasonable excuse for not doing so. The penalty for failing to do this is \$2,000.

Subclause 7(3) requires the Commissioner to amend the licence when it is received and then return it to the licensee.

Clause 8 deals with the method of changing licensed premises.

Subclause 8(1) requires a licensee, at least 28 days before commencing business in premises other than those listed on the licence or 28 days before ceasing business in the premises listed on the licence, to submit the licence to the Commissioner together with notice of the new address and the date from which the premises will alter.

Subclause 8(2) requires the Commissioner to amend the licence and return it to the licensee within 7 days.

Subclause 8(3) provides that the amendment of the licence will take effect on the date specified in the notice referred to in subclause 8(1).

Clause 9 deals with the renewal of licences.

Subclause 9(1) requires the Commissioner to renew a licence on receipt of an application accompanied by any particulars that may be required under section 18 of the Tax Act.

Section 18 enables the Commissioner to require a person to provide further information in connection with the making of an application under the Business Franchise ("X" Videos) Bill 1990.

Subclause 9(2) requires a renewal application to be made at least 7 days before the expiry of the existing licence and to be accompanied by:

- (a) the basic fee;
- (b) i) in the case of the first application for renewal 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.
- (c) the information relied upon by the applicant in estimating the advance or calculating the franchise fee.

Subclause 9(3) permits the Commissioner to renew a licence even where the application is not made in accordance with subclause 9(2).

Subclause 9(4) requires the Commissioner to refund to the applicant an amount equal to the total of the amounts accompanying the application where that application for renewal is refused.

Subclause 9(5) provides that section 19 does not affect the liability for a franchise fee calculated in relation to 'X' videos supplied by wholesale or offered for retail sale in the first 2 months after the licence is granted.

Clause 10 deals with the cancellation of licences.

Subclause 10(1) allows the Commissioner to cancel a licence if he or she is satisfied on reasonable grounds that:

- (a) it was granted in error or as the result of a false statement or misleading information;
- (b) the licensee has contravened a condition of the licence;
- (c) the licensee has contravened a provision of the Act, the Tax Act, or the Publications Control Act 1989;
- (d) the licensee has been convicted of an offence against the Act, the Tax Act or the Publications Control Act 1989 or has been convicted of an offence punishable by a fine of \$10,000 or more or a term of imprisonment of 1 year or more;
- (e) the licensee is an undischarged bankrupt;
- (f) the licence, where it is a body corporate, is being wound up; or
- (g) the licensee is not a fit and proper person to hold such a licence.

Subclause 10(2) provides that criteria (c), (d) and (g) of subclause 10(1) will, when the licensee is a body corporate, be applied to each director, secretary or officer of that body.

Subclause 10(3) requires the Commissioner, before cancelling the licence, to give notice in writing to the licensee of the intention to cancel it and invite the licensee to show cause why it should not be cancelled.

Subclause 10(4) provides that such a notice is to contain the grounds upon which the Commissioner believes the

licence ought to be cancelled and a statement informing the licensee that he or she may, within a period of not less than 14 days after the notice is given, supply to the Commissioner written notice of the reasons why the licensee believes the licence ought not to be cancelled.

Subclause 10(5) provides that the Commissioner shall cancel the licence where the licensee does not, within the time specified in the notice, show cause which is, in the opinion of the Commissioner, reasonable as to why it should not be cancelled.

Subclause 10(6) provides that cancellation of a licence takes effect at the end of the day on which the notice of cancellation issued under clause 22 is given to the licensee.

Clause 11 deals with the surrender of a licence.

Subclause 11(1) requires a licensee to return the licence to the Commissioner together with notice in writing within 7 days of having ceased to operate within the terms of that licence. Failure to do this without reasonable excuse will attract a penalty of \$2,000.

Subclause 11(2) provides that the surrender of the licence will take effect on the date notice of surrender is given in accordance with subclause 11(1).

Clause 12 deals with the expiration of licences and requires a former licensee to return to the Commissioner within 7 days his or her licence where that licence has expired due to lapse of time or cancellation. Failure in this regard without reasonable excuse will attract a penalty of \$2,000.

Division 2 - Licensees' Obligations

Division 2 consists of clauses 13 to 15 and deals with a licensee's obligations.

Clause 13 requires that a licensee keep such records as are prescribed in addition to those which must be kept pursuant to section 96 of the Tax Act. Failure to do this will attract a penalty of \$500.

Section 96 obliges a person to keep books and accounts relating to licence fees and to keep for a period of 6 years.

Clause 14 provides that, in the case of a corporate licensee, where there is a change in the position of a director, secretary or officer, the licensee is to give the Commissioner written notice of the change within 7 days. Failure to do this without reasonable excuse will attract a penalty of \$2,000.

Clause 15 requires a wholesale licensee to write the words "SUPPLIED BY LICENSED A C T WHOLESALER" in a legible fashion on every invoice which related to a video supplied pursuant to that licence. The penalty for failing to do this will be \$500.

Division 3 - Licence fees

Division 3 consists of clauses 16 to 21 and deals with licence fees.

Clause 16 provides that, in this Division of the Act, the term "X" video will include a video which, at the time it was being offered for retail sale or in any other case, supplied, was not classified or had been refused classification of Publications Ordinance 1983, but which is later classified as an "X" film. This ensures that a person who trades in unclassified videos or videos which have been refused classification will not escape the liability to pay fees on such videos if they are subsequently classified "X".

Clause 17 provides that this Division is applied to the supply of 'X' videos by a wholesale licensee or to an offer of an 'X' video for retail sale by a retail licensee whether that video is manufactured, supplied or offered for sale by wholesale or retail within or outside the Territory. This provision recognises that 'X' videos are supplied to or by persons outside the Territory and subjects them to a fee in the ACT.

Clause 18 provides that the basic fee for each premises for which a licence or renewal of a licence is held will be \$50.

Clause 19 deals with advance fees.

Subclause 19(1) provides that the advance fee for the grant or first renewal of a wholesale licence will be an amount equal to 40% of the total wholesale value of the 'X' videos supplied by wholesale in the month for which the licence is granted or renewed.

Subclause 19(2) provides that the advance fee for the grant or first renewal of a retail licence will be an amount equal to 40% of the total wholesale value of 'X' videos manufactured by the licensee and 'X' videos supplied to the licensee which are not obtained from wholesale licensees in the month for which the licensee is granted or renewed.

Subclause 19(3) provides that the advance fee is due and payable by the expiration of the relevant month for which it was calculated whether or not the relevant licence is still in force.

Subclause 19(4) provides that the amount paid as the estimated advance fee will be held in account against the relevant advance fee.

Clause 20 deals with franchise fees.

Subclause 20(1) provides that the franchise fee for renewal of a wholesale licence will be an amount equal to 40% of the total wholesale value of 'X' videos supplied by wholesale by the licence in the month which is 2 months prior to the month which the renewal is applied for.

Subclause 20(2) provides that the franchise fee for renewal of a retail licence will be an amount equal to 40% of the total wholesale value of 'X' videos manufactured by the licensee and supplied to the licensee other than from wholesale licences, in the month which is 2 months prior to the month for which the renewal is sought.

Clause 21 provides that where the advance fee or franchise fees have been due and payable by a licenced wholesaler, no further advance or franchise fees are payable in any subsequent supply or offer for retail sale.

PART III - ADMINISTRATIVE REVIEW

Part III consists of clauses 22 and 23 and deals with the administrative review of decisions.

Clause 22 deals with the giving of notice once a decision has been made.

Subclause 22(1) requires the Commissioner to give to an applicant or licensee written notice of a decision in relation to an application or licence within 28 days of that decision being made.

Subclause 22(2) provides that notice of a decision must contain a statement of the applicant's rights under the Administrative Appeals Tribunal Act 1989, especially to the effect that the applicant may appeal to the ACT Administrative Appeals Tribunal and may also seek a statement of reasons for the decision from the Commissioner.

Subclause 22(3) provides that a decision is not rendered invalid by the failure to comply with the requirements of this section.

Clause 23 provides that an application may be made to the ACT Administrative Appeals Tribunal for the review of a decision referred to in subclause 23(1).

PART IV - OFFENCES

Part IV consists of clauses 24 to 26 and deals with offences.

Clause 24 deals with offences related to the wholesaling of "X" videos.

Subclause 24(1) provides that a person, who is neither a wholesale licensee nor an employee or agent of a wholesale licensee, shall not wholesale "X" videos. The penalty for infringing this provision is a fine of \$5,000 or a term of imprisonment of 2 years, or both.

Subclause 24(2) provides that wholesale licensees and their employees or agents shall only wholesale "X" videos in accordance with the licence. The penalty for infringing this provision is a fine of \$2,000 or a term of imprisonment of 1 year, or both.

Clause 25 provides that a person is not to retail an "X" video except in accordance with a retail licence and the penalty for infringing this provision will be a fine of \$2,000 or imprisonment for 1 year, or both.

The penalties imposed by clauses 24 and 25 are consistent with penalties imposed under the Business Franchise (Tobacco and Petroleum Products) Act 1984 for like offences.

Clause 26 deals with wholesale invoices.

Subclause 26(1) provides that a person who is not a wholesale licensee is not to cause to be written the words 'SUPPLIED BY A LICENSED A C T WHOLESALER' or similar words on an invoice issued in relation to an "X" video he or she supplies. The penalty for infringing this provision will be \$1,000.

Subclause 26(2) provides that subclause 27(1) will not apply where the "X" video is supplied in accordance with a wholesale licence by an employee or agent of a wholesale licensee.

PART V - MISCELLANEOUS

Part V consists of clauses 27 to 30 and deals with miscellaneous matters

Clause 27 deals with the recovery of fees from unlicensed persons.

Subclause 27(1) provides that where the Commissioner believes on reasonable grounds that a person supplies an "X" video without an appropriate license, that person will be liable to pay the necessary fees as if he or she were licensed.

Subclause 27(2) provides that subclause 26(1) is to apply regardless of whether or not the supplier in question has been convicted of an offence under clauses 23 or 24.

Subclause 27(3) provides that the Tax Act applies to this clause as if the supplier were properly licensed when supplying the "X" videos in question.

Clause 28 deals with the conduct of directors, servants and agents.

Subclause 28(1) provides that where it is necessary to establish the state of mind of a body corporate or natural person, it is sufficient to show that a director, servant or agent of the licensee had a particular state of mind while acting within his or her actual or implied authority.

Subclause 28(2) provides that a reference in subclause 27(1) to a body's or a person's state of mind will include a reference to knowledge, intention, opinion, belief or purpose as well as the body's or person's reason for the intention, opinion, belief or purpose.

Subclause 28(3) provides that any conduct of a director, servant or agent that is engaged in on behalf of a body corporate or natural person within his or her actual or implied authority will be taken as conduct engaged in by that body or person unless the body or person establishes that reasonable precautions were taken to prevent the conduct occurring.

Subclause 28(4) provides that where a person is convicted of an offence solely on the basis of subclauses 27(1) and (3) that a person will not be subject to imprisonment as a penalty

Subclause 28(5) provides that a reference in clause 27 to engaging in conduct will include failing or refusing to engage in conduct

Clause 29 provides that where a body corporate is convicted of an offence against the ACT the Court may impose a fine which is up to 5 times greater than it might otherwise have imposed.

Clause 30 provides that the Executive may make regulations which prescribe matters which are set out in the Act to be prescribed for the purposes of the Act so long as they are not inconsistent with the Act.

ATTACHMENT B

Short title

Clause 1 cites the short title of the Bill. Once enacted, as the Taxation (Administration) (Amendment) Act (No. 3) 1990 (the Act)

Commencement

Clause 2 provides that clause 1 will commence on the day the Act is notified in the Gazette and the remaining provisions will commence on 1 July 1990.

Principal Act

Clause 3 provides that the term " Principal Act" is to refer to the Taxation (Administration) Act 1987.

Tax Laws

Clause 4 amends section 3 of the Principal Act by adding the Business Franchise ("X" Videos) Act 1990 and any regulations made under it to list of tax laws set out in that section.

Interpretation

Clause 5 amends the interpretation section of the Principal Act (section 4) by adding to the definition of the term "licence fee" a fee payable under the Business Franchise ("X" Videos) Act 1990.

Powers of inspection

Clause 6 amends section 12 of the Principal Act which deals with powers of inspection

subsection 12 (1) is amended to give authorised tax officers full and free access to any "X" Video

Subsection 12 (2) is amended to allow authorised tax officers to inspect "X" Video on premises, seize any "X" Video reasonably believed to be connected with an offence against a tax law and require the occupier of any premises licensed under the Business Franchise ("X" Videos) Act 1990 to supply his or her name and address.

A new subsection 12 (4) is inserted to define "X" Video for the purposes of section 12 . Such a video will mean a video classified under the Classification of Publications Ordinance 1983 as "x" film and an unclassified video which a tax officer believes on reasonable grounds would be "X" classified if it were classified.

Seizure

Clause 7 amends section 12A of the Principal Act to bring "X" Videos within the requirements of the Principal Act to seizure of goods.

Trustee duties

Clause 8 amends section 14 of the Principal Act to require a trustee of a deceased person's estate to supply all notices, documents and information that are required under a tax law.

Assessment of tax duties and licence fees

Clause 9 amends section 15 of the Principal Act which relates to the assessment of tax to require the Commissioner to assess the amount of tax duty or licence fee payable by using all information which is available including all information accompanying a return application or notice.

Further information

Clause 10 amends section 18 of the Principal Act with the provision of further information to also cover applications made under a tax law rather than only information relating to returns and instruments.

Failure to lodge documents etc

Clause 11 amends section 30 of the Principal Act which deals with failure to lodge documents so as to make subject to a penalty tax a failure to lodge an application for a renewal of a licence.

The amendments made by clauses 9, 10 and 11 extend the application of sections 15, 18 and 30 respectively of the Principal Act to the licensing and franchise scheme introduced by the Business Franchise ("X" Videos) Bill 1990.