

Australian Capital Territory

# **Tobacco (Compliance Testing Procedures) Approval 2007 (No 1)**

**Disallowable instrument DI2007–80**

made under the

**Tobacco Act 1927, s42D (Approval of compliance testing procedures)**

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**1 Name of instrument**

This instrument is the Tobacco (Compliance Testing Procedures) Approval 2007 (No 1).

**2 Commencement**

This instrument commences the day after notification.

**3 Approval**

I approve the Tobacco Compliance Testing Procedures at schedule 1.

Katy Gallagher MLA  
Minister for Health  
22 March 2007

**ACT Health**  
**Health Protection Service**

**Tobacco**  
**Compliance Testing Procedures**

**March 2007**

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## 1 Acknowledgements

The ACT gratefully acknowledges the contribution of the Victorian Department of Human Services. These procedures have been developed by ACT Health in conjunction with the Department of Justice and Community Safety and the Office of Children, Youth and Family Support.

## 2 Definitions

**Authorised Officer** is a person authorised to be an officer under section 32 of the *Tobacco Act 1927* but may not be a police officer (see section 42A).

**Informed consent**, by a person, means consent given by the person after the following matters have been explained to the person:

- (a) a purchase assistant's role in a compliance test;
- (b) the effect of section 42F and section 42G (Indemnification of authorised officers and purchase assistants); and
- (c) anything else required by the approved procedures.

**Parental responsibility**, for a young person, means a person who has parental responsibility for the young person under the *Children and Young People Act 1999*. A person has parental responsibility for a young person if they are his or her parent; a court order is in force in relation to the young person in favour of the person; or because of emergency action taken under the Act. If the Chief Executive, Department of Disability, Housing and Community Services, shares parental responsibility with another person, contact must be made with the department's Care and Protection Services.

## 3 Introduction

These procedures outline the requirements for conducting 'compliance tests' (CTs) which involve young persons acting as purchase assistants on behalf of the Territory. Purchase assistants are unpaid volunteers.

The aim of introducing a program of CTs is to reduce the supply of cigarettes to people under the age of 18 years by increasing tobacco retailer compliance with the cigarette 'sales to minors' provisions of the *Tobacco Act 1927* (the Act). The Act prohibits the sale of smoking products to anyone under the age of 18.

There is now overwhelming evidence that the only effective way to achieve and maintain high levels of retail compliance is through the use of CTs.

A compliance test:

- involves a young person (a purchase assistant), under the supervision of an authorised officer, purchasing, or trying to purchase, tobacco products from tobacco retailers; and
- is carried out to obtain evidence for enforcement actions for an offence against section 14 (Supply of smoking product to under 18 year olds) of the Act in relation to a tobacco product.

These procedures are approved under section 42D of the Act for carrying out an approved program of compliance testing.

These procedures will be subject to review, taking into account any issues that may arise in the course of conducting CTs.

## **4 Guiding Principles**

These procedures have been developed to:

- facilitate the conduct of CTs;
- protect young persons in line with the provisions of the *Children and Young People Act 1999*;
- ensure anonymity of the young person;
- ensure welfare, health and safety of the young person;
- ensure that the retailer cannot be said to have been misled into selling the product;
- ensure consistency; and
- ensure that CTs are conducted in accordance with an approved program.

## **5 Responsibilities**

The Agency is responsible for the implementation, effective operation, and review of the procedures.

The day to day operation of the procedures will be managed by the Registrar of Tobacco.

## **6 Procedure**

### **6.1 Team Leader**

Only Authorised Officers under the Tobacco Act may undertake a CT. There should be at least two officers in a team. One officer will be the team leader, the other officer(s) are support officers. Team leaders and support officers have defined roles under these procedures.

### **6.2 Selection of purchase assistants**

Engagement and training of young persons are outlined in the Purchase Assistants (PAs) Guidelines at **Appendix 1**.

### **6.3 Contact with persons with parental responsibility**

The Team Leader will contact and visit the person(s) with parental responsibility for the young person (potential PA) and the young person and ensure:

- The young person and the person(s) with parental responsibility are fully informed of the aims and objectives of the compliance testing activity. An information sheet (at

**Appendix 2)** is to be provided to the young person and the person(s) with parental responsibility.

- The young person and the person(s) with parental responsibility are advised on how the PA should be dressed and appear.
- The birth certificate is examined and a certified copy obtained.
- The young person is of the correct age for a CT, ie. that the person is above 15 years of age but below 17 years of age.
- Participation must not have any element of compulsion and have the consent of the young person and the person(s) with parental responsibility.
- The young person must be told they can withdraw from a CT program at any time.
- Both the Consent (at **Appendix 3**) and Agreement forms (at **Appendix 4**) are to be completed.
- The person(s) with parental responsibility and the young person are to be made aware that:
  - The exercise may result in legal action against the tobacco retailer.
  - The young person may be required to provide evidence in court if requested by a Magistrate. Wherever possible, evidence presented to the court will be provided by the authorised officers supervising compliance tests.
  - If the young person is required to give evidence, the Court has certain rules and procedures to protect the young person. These rules and procedures are further explained in the information sheet at **Appendix 2**. Safeguarding the identity of the young person is paramount for the Agency.

## 6.4 Preparation

The approved program should identify premises that will be visited.

The following equipment should be prepared for conducting CTs: list of premises; digital camera; business cards; identification; mobile phones; petty cash (for purchase of cigarettes); labels for smoking products evidence bags; tobacco education material; necessary forms and log books; and dictaphone.

CTs are to take place during retail business hours. A CT must not be conducted by a PA in premises where they are not authorised to enter or be in a place that it would be unlawful for the PA to enter or be in, e.g. a gaming area under the *Gaming Machine Act 2004*.

The Consent form is to be signed by the Registrar of Tobacco to authorise the start of the CT Program. This Consent form is part of the Program.

A Risk Assessment is to be completed as part of the Program.

There should be at least one authorised officer of the same gender as the PA.

All officers involved should be dressed informally and will comply with these procedures at all times.

The PA should not wear make up, jewellery or clothes that make them appear older than their true age and should not have any personal possessions on them during CTs.

Suitable refreshments will be provided at the expense of the Agency.

On each day that the PA is involved they will be photographed in colour against a height chart and date notice, wearing the clothes which will be worn during the CT. A close up of their face should also be taken. These photographs must be witnessed and dated by the officer who takes them. If the PA changes their appearance during the day, e.g. takes off outer clothing, additional photographs should be taken. Photographs should reflect the PA's exact appearance for each CT.

The Team Leader will issue an identification number to each PA and this number and their birth date is used rather than their name on any records (to maintain anonymity). These records should have an appropriate security classification to prevent the disclosure of the information.

A statutory declaration must be obtained to prove the young person's date of birth. A copy of the birth certificate should be supplied by the person(s) with parental responsibility for the young person and certified. A young person cannot prove his/her own date of birth.

An agreed script and instructions will be rehearsed with the PA before the CT starts. The instructions will include:

- walk straight into the shop after leaving the Support Officer;
- ignore the Team Leader in the shop unless assistance is required;
- always speak in a clear voice;
- ask for or select (as appropriate) the product stipulated by the Team Leader; for example, Peter Jackson Super Mild 20s;
- you must not attempt to persuade the retailer to sell the cigarettes to you;
- do not talk to other customers in the store;
- pay for the goods;
- answer **all** questions **truthfully**, if asked by the retailer;
- if the retailer asks, "Do you have identification?", respond by saying, "No";
- if the retailer asks, "What is your age?", respond by giving your actual age;
- if the retailer asks, "Are you 18 years old?", respond by saying, "No";
- you should not proceed with the CT and should leave the shop immediately if the retailer asks complex questions, asks for personal information (your name or where you live) or if you become uncomfortable with the situation - withdraw by saying, "Don't worry about it" and leave the store;
- leave the shop immediately after the sale or refusal and return to the Support Officer;
- you should leave the shop immediately if instructed to do so by the Team Leader who is inside the shop;
- if a sale took place, hand over the purchase and any remaining money to the Support Officer as soon as you return to him/her;
- do not be concerned whether or not a purchase was achieved.

It is very important **not** to ask for the same brand of cigarettes at every shop visited, as word of mouth could alert the next premises.

## 6.5 Field procedures

The health, safety and welfare of the PA outweighs all other considerations when in the field. The PA has the right to withdraw from the compliance test at any time, and may

use an officer's work mobile if the call is related in any way to the compliance test. The PA is not to be collected from their home before 8am or returned after 6pm. They must not take part in compliance tests for more than 7 hours (including any rest breaks) on any one day. The PA should be given a break of at least 30 minutes every 3 hours.

Authorised officers are responsible for the young person's safety and welfare whilst they are in their care. The PA is to be fully supervised and supported at all times when conducting a CT.

The outcome of the CTs and its effect on individuals should not be discussed in front of the PA, for example whether a person may lose their job or be prosecuted.

The PA should be asked if they have previously attended the premises where a CT is to be conducted. Because of the size of Canberra it is possible for a PA to have visited a shop previously although it may not be in their suburb. The PA should be asked how regularly they may have attended the premises. If the PA has attended the premise, another premise should be selected for a CT.

The purpose of the CT is to ensure compliance, therefore a sale or a refusal should not be considered either a success or failure.

CTs may result in legal action against the tobacco retailer. The collection of evidence should be as complete as possible to avoid the need for the PA to give evidence. The court can require the PA to give evidence, however, wherever possible all the evidence needed is to be provided by the authorised officers who conducted the CT.

## **6.6 Conduct of a CT**

1. The team proceeds to the vicinity of the premises to be visited, leaving any vehicles used out of sight of the premises.
2. The team should assemble near to but out of sight of the premises.
3. The Team Leader is to ensure that the PA is not in possession of personal items, including any ID or smoking products and is to remind them of the instructions.
4. The PA is to be provided with the money for the CT purchases, up to \$20. The denominations given to the PA should be varied between each CT, ie. two \$5 notes, plus a \$10, some coins or the correct amount. A young person with a \$20 note may raise a seller's suspicion.
5. The PA should be reminded that if they feel uncomfortable or are not sure of what they must do, they should leave or change the intent of their visit and purchase a drink or confectionary instead of cigarettes.
6. The Team Leader will enter the shop, and having viewed the layout, take up a position where he/she can remain inconspicuous yet may witness both physical events and verbal interchanges. The officer should avoid being identified.
7. The PA and a Support Officer then approach the shop, but are to be out of sight of the shop assistant.



8. The PA will then enter the shop, attempt the purchase, and on conclusion immediately leave the shop where they will be met by the waiting Support Officer.
9. If the purchase attempt does not go smoothly or the young person appears distressed the Team Leader is to immediately intervene and cease the CT and direct the young person to leave the shop.
10. Having met the PA from the shop, the Support Officer will take any item purchased and the cash balance from the PA. The cigarette packet should be placed in an evidence collection bag and labelled. The PA is to remain with the Support Officer. The Support Officer should take steps to ensure the PA's safety and welfare.
11. Once the PA has left the shop, having just conducted a CT, under no circumstances is the PA to return to the shop nor is the shopkeeper to be taken to where the PA waits with the Support Officer.
12. If no sale takes place, the money is to be retrieved from the PA, a record of events completed and the team is to proceed to the next premises. Before proceeding to the next premises, the PA should be debriefed and any issues reviewed.
13. If a sale takes place, the Team Leader should make a record of any conversation that took place between the seller and the PA. If the Team Leader was not able to hear all of the conversation, further detail should be sought from the PA. A distinction should be made between what was heard by the officer and that of the PA.
14. At this time, the authorised officers may seize anything on the premises connected with an offence under the *Tobacco Act 1927*, including any video surveillance tape associated with the premises that was recorded during the time that the CT took place. A blank tape is to be given to the proprietor as a replacement.
15. At the end of the CT operation, after returning the PA to his or her home, the Team Leader should return to the premises with the Support Officer to conduct an interview with the seller of the tobacco product. During the interview the Officer must **not** reveal any identifying details of the PA, other than a brief, verbal description of their appearance i.e. a male with brown spiky hair wearing a blue jumper and black pants. Photographs of the PA must **not** be shown. Suggested interview notes should be used and completed by the Team Leader.
16. After any sales the officer is to record the purchases and change on the record of compliance testing events form. A complete record is to be made of all circumstances surrounding the event and a record made of any deviation from this procedure or any difficulties found in the undertaking of CTs.
17. The PA should be taken home at the end of the CTs. The PA should be asked if they wish to debrief/reflect on the day's events. The person(s) with parental responsibility for the young person is to be advised of any CT related incidents experienced by the PA.

## **6.7 Follow up after completion of a program of CTs**

Following the involvement of the PA in a CT, and within 7 days from the end of a CT, the Team Leader should visit the PA and the person(s) with parental responsibility to establish whether the young person has any concerns about having conducted a CT or has suffered any ill effects or repercussions. If the PA expresses any concerns, the Team Leader should report the concerns to the Registrar of Tobacco so the Agency can arrange for counselling and support services.

A letter of appreciation should be sent to the young person and the person(s) with parental responsibility. Within three weeks of the PA's involvement in a CT, follow up letters should be sent to the person(s) with parental responsibility for the young person to determine whether the young person has suffered any further ill effects or repercussions associated with the CT.

The results of the program should be stored in the appropriate file to monitor trends and given appropriate protection.

The Registrar of Tobacco is required by the Act to report the following to the Chief Executive of Health:

- the number of compliance tests carried out during the financial year;
- the number of contraventions of section 14 (Supply of smoking product to under 18 year olds) detected by the tests; and
- actions taken in relation to the contraventions.

This information will be reported in ACT Health's Annual Report for each financial year.

## **APPENDIX 1 – Purchase Assistants Guidelines – Engagement and Training**

### **1. Obtaining purchase assistants (PAs):**

PAs may be sought through the following avenues:

- Through a recruitment agency; and/or
- Placement of an advertisement in a paper.

### **2. Choosing an appropriate assistant**

The following guidelines are to be adhered to when selecting an appropriate assistant to ensure that the young person is indistinguishable from any other young person who tries to buy cigarettes.

PAs should:

- not face any compulsion to participate;
- obtain consent from the person(s) with parental responsibility for the young person;
- not have immediate family members employed by the Agency;
- not have immediate family members who are licensed tobacco retailers;
- be 15 or 16 years of age;
- look their age;
- be the maximum height of 178 cm;
- be a non-smoker;
- be confidently able to perform the task;
- be of good character;
- live and have been or currently being educated outside of the area they are to purchase within; and
- attend an information and training session with the person(s) with parental responsibility for the young person.

The young person and the person(s) with parental responsibility for the young person, prior to undertaking the training for the purpose of being a PA for CTs, must sign a Consent form (at **Appendix 3**). If two people have parental responsibility then both signatures will be required.

Following the training session of the young person and before the commencement of CTs, the young person and the person(s) with parental responsibility for the young person must sign a consent form (**Appendix 4**).

### **3. Notifying PA of CT**

Prior to the CT day, the PA should be contacted by telephone and advised the following:

- collection point and time;
- approximate finishing time;
- to dress casually as a 15 or 16 year old would;
- not to have piercing (females may have ear piercing);
- not to wear makeup;
- not carry ID, such as a student card;
- not to carry cigarettes; and

- that the Officer must confirm with the PA that the areas where the PA will be conducting CTs is not an area where they generally frequent.

#### **4. Training of PAs**

The objective of the training will be:

- to develop the PAs understanding as to why the Agency has introduced the process of CTs;
- to familiarise the PA with their role and responsibilities in the CT processes;
- to clarify the PA's rights and responsibilities as a young person engaged in the Agency's processes; and
- to inform the PA of how and in what circumstances to abort the CT.

This training will include CT scenarios and role plays, so that the PA is fully conversant with what they are required to do.

The principles of duty of care for the PA are paramount and this will be outlined in the training of PAs and Officers who take part in CTs. As part of this duty of care to young people, the PA should be advised that:

- Their health, safety and welfare are the most important considerations.
- They have the right to withdraw from the CT at any stage.
- They can ask permission to use a phone to contact family if necessary.
- They will be offered debriefing or formal counselling following the CT. The Agency will arrange counselling sessions if required.
- The person(s) with parental responsibility for the young person will be contacted and advised of any CT-related incidents experienced by the PA.

#### **5. Repeated CT policy**

The Team Leader must ensure that PAs do not take part in CTs on premises where they have previously purchased cigarettes while engaging in CTs carried out by the Agency.

## **APPENDIX 2 – Compliance Testing Information Sheet**

### **Introduction**

Teenage smoking is a major public health concern. Reducing smoking among teenagers in the ACT community is one of our highest priorities. Teenage smoking rates in the ACT are particularly high with 17 per cent of teenagers aged 16-17 years smoking regularly. The younger teenagers are when they start smoking, the more likely they are to be heavier, more addicted smokers, and have a higher probability of developing smoking-related diseases.

A survey conducted in 2002 found that nearly one-fifth of ACT smokers aged 12-17 purchased their last cigarette, with more than one-third stating that they have never been refused a sale or asked for proof of age. The survey also found that among smokers aged 16-17, nearly half purchased their last cigarette.

Section 14(1) of the *Tobacco Act 1927*(Act) prohibits the sale of smoking products to persons under 18 years of age. ACT Health has developed legislation that allows compliance testing for the sale of smoking products to persons under the age of 18. Compliance testing is a test-purchase made by a trained young person (purchase assistant) under the supervision of an authorised officer. There will be at least two authorised officers conducting a CT with the purchase assistant.

### **Role of the Purchase Assistants**

The purchase assistant (PA) is a young person, who will be watched by an authorised officer (the Team Leader), enters a premise where smoking products are sold and attempts to purchase a product. PAs are volunteers, unpaid.

During the test purchase, the PA must obey the instructions given to him/her by the Team Leader or the Support Officer. The PA must not in any way try to persuade the seller to sell the smoking products to him/her. The PA must tell the truth about their age.

If asked about identification, the PA must indicate that he/she does not have any identification.

After the test purchase is completed, the PA must return to the Support Officer located outside the premises and hand over any purchased smoking products and money from the sale (if a sale took place).

The health, safety and welfare of the PA are the most important considerations and if the PA feels uncomfortable, he/she can withdraw from the compliance test at any time.

The PA is provided with training on all the aspects of the compliance testing. The PA's identity will be kept confidential. Any personal information concerning PAs may only be given if this is requested by a Court for legal action against the tobacco retailer to proceed. If the Court asks for personal information about the PA, efforts will be made to ensure that only the Court has the information and not the defendant.

The Agency will provide the Court with all the evidence it requires but the PA may also be asked to give evidence. If the PA is required to give evidence legislation provides that a young person must be allowed to give evidence from outside the courtroom using an

audiovisual link (but from within the precincts of the courthouse) unless the Court considers it more appropriate the young person give evidence inside the courtroom.

The PA will not take part in compliance testing for longer than 7 hours (including rest breaks) on any one day. A break of at least 30 minutes will be taken every 3 hours. The PA will not be collected from their home before 8am or returned after 6pm.

### **Role of the Authorised Officer**

At least two authorised officers will conduct the compliance test program. The Team Leader will contact and visit you, the person(s) with parental responsibility for the young person, and in the presence of the young person, advise you of the process, answer questions, and provide information and consent forms.

The Team Leader will provide the money for the purchase of smoking products and the transport to and from the premises where a compliance test will take place. The PA will at all times be in the company of an authorised officer, before, during and after the compliance test. The Team Leader will be present inside the premises during the compliance test and observe the test purchase.

The authorised officers will take a record of what occurred during a compliance test.

Compliance tests may result in legal action against the tobacco retailer. The young person may be required to provide evidence in the court if requested by the Magistrate. Wherever possible, evidence presented to the court will be provided by the authorised officers supervising compliance tests.

If the young person is required to give evidence a law requires the young person to be allowed to give evidence via closed circuit television, unless the court orders otherwise. The prosecution may also seek to protect the identity of the young person from disclosure.

### **Liability issues**

A PA cannot be sued or charged with a criminal offence for any of their actions while engaged in carrying out compliance tests, provided that they do so in good faith and in accordance, or substantially in accordance, with the approved procedures (training) and any instructions by the authorised officers supervising the compliance tests.

### **Follow up after compliance tests**

Following the involvement of the PA in compliance testing, and within 7 days from the compliance test, an authorised officer will visit you and the PA to establish whether the young person has any concerns about having conducted a CT or has suffered any ill effects or repercussions. If the PA expresses any concerns, the Team Leader will report the concerns to the Registrar of Tobacco so the Agency can arrange for counselling and support services.

Three weeks after the PA has assisted in compliance testing, the Agency will contact you and the PA to determine if there are any further issues or effects from their involvement in compliance testing.

### **APPENDIX 3 – Consent Form for Compliance Testing**

**This consent is to ensure that you as the person(s) with parental responsibility and the young person are aware of what the Agency intends to do and what safeguards will be used.**

The young person will be fully trained in what to say and do in a compliance test. You may attend the training session(s). The young person will be told to tell the truth at all times.

At least one authorised officer will supervise the young person at all times.

The young person will be asked if they have previously attended the premises where a compliance test is to be conducted. They will not be asked to make a compliance test at the premise if they have attended the premises or any other area where he/she is likely to be recognised.

The health, safety and welfare of the young person outweighs all other considerations. The nature of the young person’s involvement in the exercise will not be revealed whilst the young person is on the premises, unless the authorised officer is of the opinion that the young person’s welfare, health and safety is at risk. The authorised officer will intervene at any time where the young person’s welfare, health and safety is at risk.

The Agency will not reveal the young person’s identity in any subsequent publicity.

Compliance tests may result in legal action against the tobacco retailer. The young person may be required to provide evidence in the court if requested by the Magistrate. Wherever possible, evidence presented to the court will be provided by the authorised officers supervising compliance tests.

There should be no compulsion, peer pressure or parental pressure for the young person to participate in this activity.

You will be asked to provide copy of the young person’s birth certificate and a statutory declaration confirming the young person’s date of birth. These may need to be used if legal action is taken against a tobacco retailer.

**Having read and understood the above, I consent to (name of purchase assistant) participating in compliance testing.**

**Signed:** ..... **Person with parental responsibility for the young person**

**Signed:**..... **Person with parental responsibility for the young person**

**Signed:**..... **Young Person**

**Signed:**..... **Authorised Officer – Team Leader**

**Date:**..... **Agency’s contact details:**

## APPENDIX 4 – Agreement Form for Compliance Testing

**Name of young person:**

**Date of Birth:**

**Male/Female**

**Address of young person:**

**Nature of exercise:**

**Date and time of collection of young person and address (if different from above):**

**Date and time of return of young person and address (if different from above):**

**Daytime contact point for young person during above dates:**

**Alternative daytime contact point for young person during above dates:**

**Areas in which compliance testing exercise will take place:**

**Areas to be avoided (e.g. areas where the young person may be recognised):**

**Any special dietary/medical needs, etc:**

I [name of the person(s) with parental responsibility for the young person] am the person with parental responsibility for the young person mentioned above. I agree that he/she will be available to assist the Agency as detailed above. I have discussed the details of this exercise with (Officer's name).

**Signed:**..... **Person with parental responsibility for the young person**

**Signed:**..... **Person with parental responsibility for the young person**

**Signed:**..... **Young Person**

**Signed:**..... **Authorised Officer – Team Leader**

**Date:**..... **Agency's contact details:**