

Australian Capital Territory

Tobacco (Compliance Testing Procedures) Approval 2014 (No 1)

Disallowable instrument DI2014–308

made under the

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

1 Name of instrument

This instrument is the Tobacco (Compliance Testing Procedures) Approval 2014 (No 1).

2 Commencement

This instrument commences the day after its notification.

3 Approval

I approve the Tobacco Compliance Testing Procedures at Schedule 1.

Katy Gallagher MLA
Minister for Health

9 December 2014

Tobacco Compliance Testing Procedures

November 2014

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1 Introduction

These procedures outline the requirements for conducting compliance tests (CTs) which involve a young person acting as a purchase assistant on behalf of the Territory.

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.

A compliance test:

- involves a young person aged 15 or 16 years of age (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, to take into account any issues that may arise in the course of conducting CTs.

2 Definitions

Agency means the **Registrations and Fair Trading Unit** of the Office of Regulatory Services.

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 2008*. 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 that Act. If the Director-General, Community Services Directorate, shares parental responsibility with another person, contact must be made with the Directorate’s Care and Protection Services.

3 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 2008*;
- 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.

4 Responsibilities

The Commissioner for Fair Trading is responsible for the implementation, operation and conduct of CTs. The conduct of a compliance test program can be delegated by the Commissioner to the Senior Director, **Registrations and Fair Trading**, Office of Regulatory Services.

Authorised Officers under the Tobacco Act may undertake a CT, with 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.

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

5 Preliminary activities

The following steps are to be taken prior to seeking approval from the delegate to carry out a CT Program. The Senior Director, **Registrations and Fair Trading**, may approve the undertaking of preliminary activities.

5.1 Selection of purchase assistants

Engagement and training of young persons are outlined in the Purchase Assistants Guidelines – Engagement and Training at **Appendix 1**.

5.2 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's age must be confirmed. The date of birth can be verified from the birth record or birth certificate supplied by the person(s) with parental responsibility for the young person.

- 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.
- The Consent Form at **Appendix 3** is to be completed. Consent will be valid for a 12 month period.
- 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.

5.3 Preparation – approval for CT Program

The Team Leader should assess the possible locations for the conduct of the CT Program, including undertaking a risk assessment identifying risks to the PA, the program and agency staff carrying out the program.

6 Approved CT Program

6.1 Team Leader preparations

The Team Leader should confirm that the approved program has identified the area where the program will operate and when the program begins and ends (required by section 42C(2)(b) of the Act).

The Team Leader should also confirm that:

- the CT is not to 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 for the PA has been signed by all relevant persons.
- the PA is asked if they have previously attended the premises where a CT is to be conducted. If the PA has attended the premise recently, another premise should be selected.
- there is at least one Authorised Officer of the same gender as the PA.

When conducting a CT Program, all officers involved should be dressed informally and comply with these procedures at all times. Refreshments are provided at the expense of the Agency.

The PA is to be photographed in colour wearing the clothes which will be worn during the CT and a record taken by the Authorised Officer. A close up of their face should also be taken. If the PA changes their appearance during the day, e.g. takes off outer clothing, additional photographs should be taken.

The Team Leader will issue an identification number to each PA. This number is to be used along with the year of their birth 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.

An agreed script and instructions will be rehearsed with the PA before the CT starts. In particular, the PA is to be reminded to:

- ignore the Team Leader in the shop unless assistance is required;
- not attempt to persuade the retailer to sell you cigarettes;
- answer **all** questions regarding your age **truthfully**:
 - advise that you do not have identification if asked
 - answer yes, if asked if the cigarettes are for you;
- leave the shop if the retailer asks complex questions, asks for personal information (your name or where you live) or if you become uncomfortable with the situation;
- pay for the goods, do not seek a receipt;
- leave the shop promptly after the sale or refusal and return to the Support Officer;
- leave the shop if requested to do so by the Team Leader;
- 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;
- not be concerned whether or not a purchase was achieved.

6.2 Health, Safety and Welfare of the Young Person

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. The PA is not to be collected from their home before 8am or returned after 8pm. 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 rest break every 3 hours of not less than 15 minutes.

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.

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. Wherever possible all the evidence needed is to be provided by the Authorised Officers who conducted the CT.

6.3 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. The denominations given to the PA should be varied between each CT, eg., \$5 notes, \$10 or \$20, some coins or the correct amount. A larger amount 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 another item 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 cigarettes should be secured and later stored in accordance with the Agency's evidence handling process. 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.
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. The Authorised Officers may take any other step appropriate to follow-up the successful sale.
15. 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.

6.4 Follow up after completion of a program of CTs

Following the involvement of the PA in a CT, and within seven days from the end of a CT, the Team Leader should contact 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 Commissioner for Fair Trading so the Agency can arrange for counselling and support services.

A reward for the conduct of the CT should be provided to the PA at this time. The nature of reward is at the discretion of the Agency and may include vouchers, including gift or movie vouchers.

A letter of appreciation should also be given to the young person and the person(s) with parental responsibility. Within three weeks of the PA's involvement in a CT, the person(s) with parental responsibility for the young person should be contacted to discuss any concerns the young person may have from their participation.

APPENDIX 1 – Purchase Assistants Guidelines – Engagement and Training

1. Obtaining purchase assistants (PAs):

PAs may be sought by any means considered appropriate by the Agency, including placing an advertisement in the newspaper. It can be indicated prior to engagement that a reward will be provided to PAs for their participation. The nature of the reward need not be disclosed.

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 a non-smoker;
- be confident;
- be of good character;

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 where possible.

3. Training of PAs

The objective of the training will be:

- to develop the PA's 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 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.

Person(s) with parental responsibility can attend the training with the young person.

4. Notifying PA of CT

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

- collection point and time;
- approximate finishing time;
- to dress casually as a 15 or 16 year old would;
- not carry ID, such as a student card;
- not to carry cigarettes; and
- confirm with the PA that the areas where the PA will be conducting CTs is not an area where they generally frequent.

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 19.1 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.

Section 14(1) of the *Tobacco Act 1927* (the Act) prohibits the sale of smoking products to persons under 18 years of age. The ACT Government has 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 (a Team Leader and one or more Support Officers) conducting a compliance test (CT) with the purchase assistant.

Role of the Purchase Assistants

The purchase assistant (PA) is a young person, who while watched by an authorised officer (the Team Leader), will enter a premise where smoking products are sold and attempt to purchase a product. PAs are given a reward by the Agency for their participation. This will be given to the PA following their participation at the follow-up meeting.

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(s) 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 aspects of 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 seven (7) hours (including rest breaks) on any one day. A break of at least 15 minutes will occur every 3 hours. The PA will not be collected from their home before 8am or returned after 8pm.

Role of the Authorised Officer

At least two Authorised Officers will conduct the compliance testing 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 a consent form.

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 court if requested by the Magistrate. Wherever possible, evidence presented to the court will be provided by the Authorised Officers supervising compliance tests. As noted above, 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 seven (7) days from the conclusion of compliance testing, 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 Commissioner for Fair Trading 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 form 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.

Name of young person:

Date of Birth:/...../.....

Male/Female

Usual address of young person:

Alternative address for collection or return (if required):

Daytime contact point for young person:

Alternative daytime contact point for young person:

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

Any special dietary/medical needs, etc:

This consent form will be valid for 12 months. 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 recently 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 court if requested by the Magistrate. Wherever possible, evidence presented to the court will be provided by the Authorised Officers supervising the compliance tests. Evidence of the young person's age, such as birth certificate, may need to be used if legal action is taken against a tobacco retailer.

There should be no compulsion, peer pressure or parental pressure for the young person to participate in this activity. The young person may withdraw from the CT program at any time.

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

Signed:..... Young Person

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

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

Signed:..... Authorised Officer

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

Authorisation to proceed with Purchase Assistant (office-use only)

Signed:..... Director, Registrations and Fair Trading