

**THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY**

TOBACCO AMENDMENT BILL 2008

EXPLANATORY STATEMENT

**Circulated by the authority of
Katy Gallagher MLA
Minister for Health**

Tobacco Amendment Bill 2008

This explanatory statement relates to the Tobacco Amendment Bill 2008 as introduced to the Legislative Assembly.

Overview

The Tobacco Amendment Bill amends the *Tobacco Act 1927*, the first significant reform of the Tobacco Act since tobacco licensing was inserted into the Tobacco Act in 1999. The Bill amends the Tobacco Act to prohibit the display of smoking products at point of sale. This prohibition will remove one of the last remaining means for the tobacco industry to promote its products. Displays are to be removed from view and licensees obliged to store products under the counter or behind opaque display cabinets. The Bill also proposes removing the ministerial exemption to allow tobacco advertising and sponsorship; amending the definition of vending machine; ban rewards for smoking product purchases; include a power for the Minister to declare certain smoking products to be prohibited; prohibit split packets and to harmonise the Act to the principles of the *Criminal Code 2002*.

To assist when reference is made between sections currently in the Act and the amending clause, *new section* is used to refer to the amending provision.

Harmonisation

The offences contained in the Tobacco Act have been harmonised with the principles of criminal responsibility contained in the *Criminal Code 2002*. By undertaking harmonisation it is ensured that the Criminal Code applies to all the offences in the Tobacco Act rather than only to those offences amended in the substantive part of the Bill. For the offences to operate effectively, to ensure that they continue to operate as they were intended, it was important for all of the offences contained in the Act to be restructured to conform to the general principles contained in the Code.

Strict liability

This Bill contains strict liability offences. Strict liability has been applied to the harmonised offences where it was clear that the intention of the offence was that it be a regulatory offence, such as failure to return a licence. Strict liability has also been applied to the following new provisions: new sections 8, 9, 10, 19.

Strict liability is usually employed where it is necessary to ensure the integrity of a regulatory scheme, such as those relating to public health and safety, the environment and protection of the revenue. People who opt into a licensing scheme for the purpose of selling tobacco are considered to be professionals who can reasonably be expected to be aware of their duties and obligations. As such, strict liability offences are more readily justified when a defendant can reasonably be expected, because of his or her professional involvement, to be aware of the requirements of the law. A defendant's frame of mind for some regulatory offences is irrelevant, unless some knowledge or intention ought to be required to commit a particular offence. Penalties for strict liability offences contained in the Bill do not exceed more than 50 penalty units and do not propose a term of imprisonment.

The mistake of fact defence expressly applies to strict liability as do other defences in part 2.3 of the Criminal Code.

Clauses

Clause 1 declares the name of the Bill to be the Tobacco Amendment Bill 2008.

Clause 2 provides for the commencement of the Act. It is proposed to commence the Act on a day fixed by the Minister by written notice. This enables the Minister to choose an appropriate commencement date that will provide sufficient notice to the community and give adequate time to prepare for the new arrangements.

Clause 3 provides that the Act amends the *Tobacco Act 1927*.

Clause 4 updates the notes for the dictionary contained in the Tobacco Act.

Clause 5 amends section 2B to be new section 3 in the Tobacco Act and provides that other legislation applies to the Act, in particular the *Criminal Code 2002*. As noted above, the Bill will harmonise all of the offences in the Tobacco Act to conform with the principles of criminal responsibility contained in part 2 of the Criminal Code.

Clause 6 amends sections 3 and 4 of the Tobacco Act to insert a new section 4. Current section 3 provides a definition for the meaning of price tickets. Price tickets are labels that supermarkets affix to shelves to indicate the price of a product. The definition has been amended to provide that the price ticket not be larger than 15cm², contain only text and be in Times New Roman type, no character of which may be more than 12 points in size. A barcode is considered text for this section. The size of the price ticket is roughly that of a 'sign here' Post-it[®] Flag. New section 9 provides for when a price ticket may be used.

Clause 7 is a technical amendment to clarify the effect of the qualification of an exception concerning the publication of the name of a manufacturer etc.

Clause 8 inserts a new part 2. Current part 2 provides for point of sale display. New part 2 provides for points of sale. The part provides for the numbers of points of sale and prohibits the display of smoking products.

New section 8 provides for the number of points of sale. This section was previously located at section 21.

New section 9 provides that a smoking product for sale at a retail or wholesale outlet must be located at a point of sale for the outlet and on the seller's side of the point of sale. The smoking product must be located not less than 1m away from any part of the customer service area in relation to the point of sale.

The new section also provides that a price ticket for a product line for sale must be located not less than 1m away from any part of the customer service area in relation to the point of sale. The price ticket is a form of advertisement, however it is recognised that retailers and wholesalers still need to be able to provide price information to customers upon request. To ensure that the price ticket does not advertise, the price ticket must be in the form provided for by new section 4, that is only text is allowed and it cannot be more than 12 points, Times New Roman. It is a strict liability offence if the occupier of a retail or wholesale outlet contravenes the point of sale or price ticket requirements.

New section 10 provides that a smoking product must be stored out of view of the outlet's customers. This includes the smoking products immediately for sale. Licensees will need to

arrange for the smoking products to be removed from view. This may be under the counter, behind self-closing opaque cabinet doors, etc. It will no longer be acceptable to display a packet or carton of the smoking products available. This requirement also applies to cigars. Placing smoking products out of sight will remove the incentive for opportunistic purchases, particularly by young people. It is a strict liability offence if the occupier of a retail or wholesale outlet contravenes the requirement to keep smoking products out of sight.

Placing displays out of sight also means that health warnings at point of sale displays are no longer required. Health warnings were effective in diminishing the ability for companies to advertise their wares, however today health warnings have the effect of advertising the location of smoking products in a supermarket, corner shop, etc. Section 23(4)(d) of the Tobacco Act allows a point of sale to display only one smoking advertisement at the point of sale. This must be to the effect that smoking products are offered for sale to over 18 years olds; it does not contain a trademark or brand name of a smoking product, or the name of a manufacturer or distributor and is A5 in size. No sign is permitted outside the store.

New section 11 provides that a regulation may prescribe any additional requirements in relation to the location or storage of smoking products. The occupier of the retail or wholesale outlet is obliged to comply with the additional requirements.

Clause 9 amends section 14(1) to (2) of the Act. Section 14 is a key provision within the tobacco licensing scheme, aimed at ensuring sales to minors do not occur and that there is an onus on tobacco retailers to take steps to ensure they do not sell to minors. Currently the offence has a penalty of 50 penalty units, which reflected its status as a regulatory offence. However, it is proposed to amend the offence to make it a fault-based offence. The maximum penalty has been increased to 200 penalty units to reflect the serious nature of the offence and the public policy that sales to minors of smoking products should not occur.

The defence in current section (2) has been updated. Rather than require the defendant to prove they were shown a document of identification, the defence requires the defendant to prove they had required the person to produce a document of identification. Additionally, the defence now requires the person to form a belief as to whether the document was genuine. The defence is a legal burden defence (see section 59(b) of the Criminal Code) as it involves matters that would be within the peculiar knowledge of the defendant, as the defendant is the person who is required to ask for the document of identification; no imprisonment is proposed. To require the defendant to prove the defence, ie., on the balance of probabilities, is considered a permissible reasonable limitation under section 28, *Human Rights Act 2004*. A document of identification is defined in subsection 14(6).

Clause 10 inserts new sections 19 to 22. Section 19 has been amended to include an additional requirement that cigarettes not be sold in packets able to be split into two. 'Split packets' emerged on the market in Victoria and South Australia in October 2006. They are constructed from two smaller packages which are joined together so that 'one' package, containing 20 cigarettes, the legal minimum in the ACT, is sold. South Australia banned split packets because of concern that the packets were likely to induce young people to purchase split packets. After purchase, a person could split the packet with a friend so that each had a cigarette packet. It is a concern the ACT shares and so a new provision has been included requiring that cigarettes be sold in a singular packet. Section 19 is a strict liability offence.

New section 20 prohibits the display of smoking products to the customers of a retail or wholesale outlet. This section, along with section 10, reinforces the requirement that smoking products must be kept out of sight.

New section 21 provides that the Minister may make a declaration to prohibit certain smoking products. Since August 2005 a condition has existed on all tobacco licences prohibiting the sale or display of fruit flavoured cigarettes. The condition was an interim measure whilst consultation was undertaken on the best approach to regulate fruit flavoured cigarettes. As a result of consultation a provision is being included in the Tobacco Act providing the Minister with the power to declare a prohibited smoking product. The Minister must be satisfied that the smoking product or the smoke of the product has a distinctive fruity, sweet or confectionary-like character and that the nature of the product or its packaging may be attractive to children. The declaration is a notifiable instrument.

New section 22 provides that it is an offence to sell a prohibited smoking product.

Clause 11 inserts a new section 23. Section 23 prohibits smoking advertising but an exemption was included to exempt certain advertising from the prohibition. The exemption was inserted in 1990 because there was a perception that the ACT was at a geographic and demographic disadvantage in securing major sporting events and sponsorships. At the time a tobacco company sponsored a major Canberra sporting group. The sponsorship arrangement ended in 1995 and the last exemption notified under the Act was in August 1995. The Commonwealth removed its exemption for sponsorship related advertising for events of international significance in October 2006. Consistent with the Commonwealth, the ACT exemption is proposed for removal.

Section 23 has also been amended to separate out the offences in current section 23(1) and so more clearly establish criminal responsibility. Current section 23(1)(a), which concerns display or broadcasting a smoking advertisement in a theatre, has been incorporated into new section 23(3), which prohibits the placing, display or broadcast of a smoking advertisement that is visible or audible in or from a public place. Audio recordings have been included in the offence in new section 23(1). It is considered it was inadvertently missed though audio is included in the definition of smoking advertising in current section 6.

An amendment is also made to current subsection (2) (new subsection 4) to remove an inconsistency with the *Tobacco Advertising Prohibition Act 1992 (Cwlth)* (TAPA). TAPA prohibits the publication of a tobacco advertisement, however subsection (2)(a) provides an exception for a smoking advertisement in or on a newspaper, magazine or book. Because of the TAPA prohibition, this exception is inconsistent and inappropriate.

Clause 12 updates the reference in section 24 to the offence in section 23(3) concerning placing, display or broadcasting of a smoking advertisement.

Clause 13 amends section 25 and inserts a new section 25A. Current section 25 has two offences. The offence at subsection (3) is new section 25A.

Section 25 is amended to remove subsection (3) and to harmonise the offence. This has included amending a provision that requires the prosecution to only prove what a reasonable person would believe and that the matter may be found to be promoted irrespective of the actual belief of the defendant. Because the actual belief of the defendant is not required to be proved this engages the presumption of innocence protected by section 22(1), *Human Rights Act 2004* (HRA).

The provision was inserted into the Act in 1999. The explanatory memorandum states that for a prosecution “what a ‘reasonable person’ would believe to be a promotion will be considered to be the basis on which an object or promotional entitlement is considered to breach the Act”. The provision has been amended to provide this objective test as to whether the object or entitlement promoted a smoking product, a trademark or a manufacturer, etc, but without completely removing the defendant’s belief.

New section 25A amends current section 25(3) to provide explicitly that object or entitlements, such as customer reward schemes, cannot be offered in combination with the sale of smoking products. There is an exception to current subsection (3) that provides that if the scheme applies equally across a whole range of products in the store or supermarket, then smoking products can be included in a customer reward scheme.

New section 25A provides that a person commits an offence if in direct or indirect association of the sale of a smoking product the person provides or offers to provide a prize, gift, discount, voucher, ticket, points or credit in a customer reward scheme. These incentives reward people for purchasing smoking products and may be inducing greater consumption as some customers may spend more on bulk smoking product purchases in order to reach the threshold for a reward. By explicitly excluding smoking products from such schemes, this is likely to reduce tobacco consumption rates and sends prospective customers a clear message that tobacco smoking is not an activity worthy of a reward.

This amendment requires that tobacco retailers and wholesalers take steps to ensure that an object or entitlement is not given. A defence is provided for a defendant who could not have reasonably identified that the sale of the smoking product was associated with the provision or offer of the benefit. This defence is intended for credit card providers who do not, generally, exercise control over the purchase of products at the point of sale, however it is expected that the credit card provider make an effort to ensure smoking product purchases are not rewarded. This is a legal burden defence because the matter is peculiarly within the knowledge of the defendant; the defendant is required to show only that it was not reasonably practicable to discharge the defence (it then falls to the prosecution to disprove this); and no imprisonment is proposed, only a maximum penalty of 50 penalty units. To require the defendant to prove the defence, ie., on the balance of probabilities (see section 59(b), Criminal Code), is considered a permissible reasonable limitation under section 28, HRA.

Clause 14 amends section 28 to harmonise the section and to remove the ministerial exemption that allowed the Minister to exempt a specified contract, agreement, undertaking or understanding from the prohibition on tobacco sponsorship. This exemption operated in tandem with the advertising exemption in section 23.

Clause 15 updates the reference to a provision that is now numbered as section 8, Numbers of points of sale. **Clauses 16** and **17** remove references to revive and revival, consequent on the amendment contained in clause 18.

Clause 18 removes a provision that provides for the revival of expired retail tobacconist’s licences. The provision is generally not included in licensing schemes, particularly given it has the effect of legitimising trading by retail tobacconist’s who have traded with an expired licence for up to 12 months. It also makes it difficult to prosecute a retail tobacconist who has traded with an expired licence. A transitional provision has been included at **clause 22** to ensure that licensees who may have or have had a licence revived under this section are not affected until that licence expires on 31 August 2008.

Clause 19 removes references to disciplinary action concerning breaches of points of sale display requirements. Section 56(2)(a) now provides that disciplinary action can impose more stringent requirements in relation to a point of sale, a price ticket or smoking advertisement; or impose a condition prohibiting smoking advertisement.

Clause 20 provides a specific regulation-making power associated with the location or storage of smoking products. **Clause 21** increases the maximum penalty that may be provided for in a regulation from 10 penalty units to 20 penalty units. The increase in penalty units provides additional scope in setting a maximum penalty appropriate to any offence included in the regulation.

Clauses 23 to 30 make technical amendments to the dictionary, updating and omitting some terms.

Clause 31 amends the definition of vending machine. When section 16 was inserted by the *Tobacco (Vending Machine Ban) Amendment Act 2004* the definition was amended to require that a vending machine must be a machine able to be used without the personal manipulation or attention of the seller or their agent. The effect of this was to create a loophole that has permitted vending machines, though controlled by bar staff, to still operate in the Territory. As the intention of the vending machine ban was to prevent ready access to smoking products by the public, the definition is amended to be a machine that is used or able to be used to supply a smoking product.

Clause 32 repeals the Tobacco Regulation 1991. This regulation provides for the health warning notices.

Schedule 1

Schedule 1 amends the remaining offences of the Tobacco Act.

As noted above, the purpose of harmonising the remaining offences is to ensure that all of the offences contained in the Tobacco Act function in the new environment that has been created by the Criminal Code. This means that in some instances it may appear that there are more offences when in fact offences have been rewritten to make it clear for each offence what is the physical element and what is the fault element, if a fault element was intended. If a fault element was not intended strict liability has been clearly stated.

There are a couple of harmonised provisions that require explanation. These are sections 18, 18A, 18B, 26 and 27. Sections 18, 26 and 27 have been amended to clarify the objective test, similarly to new section 25.

Section 18A and 18B were previously in section 18. As section 18A concerns an administrative provision it has been taken out of the offence provision at section 18. This section has been drafted to be consistent with new section 21, to provide that the Minister may declare a food or toy or its packaging a declared smoking product. The declaration is a notifiable instrument. Section 18B creates an offence of selling or importing a declared smoking product.